UNITED STATES DEPARTMENT OF THE INTERIOR
WASHINGTON, D.C. 20240

Secretary of the Interior ..... Thomas S. Kleppe

Office of Hearings and Appeals . . . James R. Richards, *Director*

Office of the Solicitor . . . H. Gregory Austin, *Solicitor*

DECISIONS OF THE UNITED STATES DEPARTMENT OF THE INTERIOR

Edited by
Vera E. Burgin
Annis K. Olsen

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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1975 to December 31, 1975. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Rogers C. B. Morton, Stanley K. Hathaway and Thomas S. Kleppe served as Secretaries of the Interior, during the period covered by this volume; Mr. Kent Frizzell served intermittently as Solicitor, Acting Secretary, and Under Secretary; Messrs Jack Carlson, James T. Clarke, Jack O. Horton, Royston C. Hughes, John Kyl, Nathaniel P. Reed served as Assistant Secretaries of the Interior; Mr. H. Gregory Austin served As Solicitor. Mr. James R. Richards, served as Director, Office of Hearings and Appeals.

This volume will be cited within the Department of the Interior as "82 I.D."

Secretary of the Interior.

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ERRATA:

Page 55—Topical Subject Heading No. 1 should read—Indian Probate: Judicial Review: *Generally*—300.0

Page 147—Left Col., Footnote 1, line 5 should read—Charlene S. Baltzor, *I-014128.*

Page 199—Left Col., Par. 1—Headnote, line 3, correct spelling the word is *requiring.*

Page 338—Footnote 1, line 22 in legal citation, add 69-2 *BCA* par. 7807.

Page 393—Left Col., line 15, add *(s)* to the word reason.

Page 398—Par. 2, line 9, correct to read: to comply with this statutory.

Page 414—Left Col., Par. 1—Headnote, line 1, correct to read: When the Government Contests.

Page 447—Right Col., Par. 3, line 9, correct vol. no. of I.D.'s to *82* I.D. 264.

Page 521—Right Col., line 3 from bottom, insert U.S.C. § *190* (1970).

Page 532—Left Col., Ctr. correct to read Opinion by Administrative Judge *Sabagh.*

Page 535—Right Col., signature should read *Mitchell J. Sabagh.*

Page 564—Left Col. line 29 correct existing room to *existing roof.*

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The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given, if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

Adler Construction Co., 67 I.D. 21 (1960) (Reconsideration)

Adler Construction Co. v. U.S., Cong. 10–60. Dismissed, 423 F. 2d 1362 (1970); rehearing denied, July 15, 1970; *cert. denied*, 400 U.S. 993 (1970); rehearing denied, 401 U.S. 949 (1971).

Adler Construction Co. v. *U.S., Cong.* 5–70. Trial Commr's. report accepting & approving the stipulated agreement filed September 11, 1972.

Estate of John J. Akers, 1 IBIA 8; 77 I.D. 268 (1970)

Dolly Cusker Akers v. *The Dept. of the Interior*, Civil No. 907, D. Mont. Judgment for defendant, September 17, 1971; order staying execution of judgment for 30 days issued October 15, 1971; appeal dismissed for lack of prosecution, May 3, 1972; appeal reinstated, June 29, 1972; aff'd., 499 F. 2d 44 (9th Cir. 1974).

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Andrew J. Kalerak, Jr., et al. v. *Stewart L. Udall*, Civil No. A–35–66, D. Alas. Judgment for plaintiff, October 20, 1966; rev'd., 396 F. 2d 746 (9th Cir. 1968); *cert. denied*, 393 U.S. 1118 (1969).

Allied Contractors, Inc., 68 I.D. 145 (1961)

Allied Contractors, Inc. v. *U.S.*, Ct. Cl. No. 163–64. Stipulation of settlement filed March 3, 1967; compromised.

Leslie N. Baker, et al., A-28454 (October 26, 1960). On reconsideration *Autrice C. Copeland*, 69 I.D. 1 (1962).

Autrice Copeland Freeman v. *Stewart L. Udall*, Civil No. 1578, D. Ariz. Judgment for defendant, September 3, 1963 (opinion); aff'd., 336 F. 2d 706 (9th Cir. 1964); no petition.

Max Barash, The Texas Co., 63 I.D. 51 (1956)

Max Barash v. *Douglas McKay*, Civil No. 939–56. Judgment for defendant, June 13, 1957; rev'd. & remanded, 256 F. 2d 714 (1958); judgment for plaintiff, December 18, 1958. Supplemental decision, 66 I.D. 11 (1959); no petition.

Barnard-Curtiss Co., 64 I.D. 312 (1957); 65 I.D. 49 (1958)

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Eugenia Bate, 69 I.D. 230 (1962)

Katherine S. Foster & Brook H. Duncan, II v. *Stewart L. Udall*, Civil No. 5258, D. N.M. Judgment for defendant, January 8, 1964; rev'd., 335 F. 2d 828 (10th Cir. 1964); no petition.

Sam Bergesen, 62 I.D. 295
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Sam Bergesen v. *U.S.*, Civil No. 2044, D. Wash. Complaint dismissed March 11, 1958; no appeal.

Bishop Coal Company, 82 I.D. 553 (1975)

William Bennett, Paul F. Goad & United Mine Workers v. *Thomas S. Kleppe, Secretary of the Interior*, No. 75–2158, United States Ct. of Appeals, D.C. Cir. Suit pending.

BLM-A-045569, 70 I.D. 231 (1963)

New York State Natural Gas Corp. v. *Stewart L. Udall*, Civil No. 2109–63

Consolidated Gas Supply Corp. v. *Stewart L. Udall, et al.*, Civil No. 2109–63. Judgment for defendant, September 20, 1965; Per curiam decision, aff'd., April 28, 1966; no petition.

Melvin A. Brown, 69 I.D. 131 (1962)

Melvin A. Brown v. *Stewart L. Udall*, Civil No. 3352–62. Judgment for defendant, September 17, 1963; rev'd., 335 F. 2d 706 (1964); no petition.

R. C. Buch, 75 I.D. 140 (1968)

R. C. Buch v. *Stewart L. Udall*, Civil No. 68–1358–PH, C.D. Cal. Judgment for plaintiff, 298 F. Supp. 381 (1969); rev'd., 449 F. 2d 600 (9th Cir. 1971); judgment for defendant, March 10, 1972.

The California Co., 66 I.D. 54 (1959)

The California Co. v. *Stewart L. Udall*, Civil No. 980–59. Judgment for defendant, 187 F. Supp. 445 (1960); aff'd., 296 F. 2d 384 (1961).

In the Matter of Cameron Parish, Louisiana, Cameron Parish Police Jury & Cameron Parish School Board, June 3, 1968 appealed by Secretary July 5, 1968, 75 I.D. 289 (1968).

Cameron Parish Police Jury v. *Stewart L. Udall, et al.,* Civil No. 14–206, W.D. La. Judgment for plaintiff, 302 F. Supp. 689 (1969); order vacating prior order issued November 5, 1969.

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Shell Oil Co. v. *Udall,* Civil No. 216–67. Stipulation of dismissal filed August 19, 1968.

Chemi-Cote Perlite Corp. v. *Arthur C. W. Bowen,* 72 I.D. 403 (1965)

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Stephen H. Clarkson, 72 I.D. 138 (1965)

Stephen H. Clarkson v. *U.S.,* Cong. Ref. 5–68. Trial Commr's. report adverse to U.S. issued December 16, 1970; Chief Commr's. report concurring with the Trial Commr's. report issued April 13, 1971. P.L. 92–108 enacted accepting the Chief Commr's. report.

Appeal of COAC, Inc., 81 I.D. 700 (1974)

COAC, Inc. v. *U.S.,* Ct. Cl. No. 395–75. Suit pending.

Mrs. Hannah Cohen, 70 I.D. 188 (1963)

Hannah and Abram Cohen v. *U.S.,* Civil No. 3158, D. R. I. Compromised.

Barney R. Colson, 70 I.D. 409 (1963)

Barney R. Colson, et al. v. *Stewart L. Udall,* Civil No. 63–26–Civ.–Oc. M.D. Fla. Dismissed with prejudice, 278 F. Supp. 826 (1968); aff'd., 428 F. 2d 1046 (5th Cir. 1970); *cert. denied,* 401 U.S. 911 (1971).

Columbian Carbon Co., Merwin E. Liss, 63 I.D. 166 (1956)

Merwin E. Liss v. *Fred A. Seaton,* Civil No. 3233–56. Judgment for defendant, January 9, 1958; appeal dismissed for want of prosecution, September 18, 1958, D.C. Cir. No. 14,647.

Appeal by the Confederated Salish & Kootenai Tribes of the Flathead Reservation, in the Matter of the Enrollment of Mrs. Elverna Y. Clairmont Baciarelli, 77 I.D. 116 (1970)

Elverna Yevonne Clairmont Baciarelli v. *Rogers C. B. Morton,* Civil No. C–70–2200–SC, D. Cal. Judgment for defendant, August 27, 1971; aff'd., 481 F. 2d 610 (9th Cir. 1973); no petition.

Appeal of Continental Oil Co., 68 I.D. 337 (1961)

Continental Oil Co. v. *Stewart L. Udall, et al.*, Civil No. 366–62. Judgment for defendant, April 29, 1966; aff'd., February 10, 1967; *cert. denied*, 389 U.S. 839 (1967).

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Edward D. Neuhoff & E. L. Cord v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. R–2921, D. Nev. Dismissed, Sept. 12, 1975 (opinion); appeal docketed, Nov. 14, 1975.

Appeal of Cosmo Construction Co., 73 I.D. 229 (1966)

Cosmo Construction Co., et al. v. *U.S.*, Ct. Cl. 119–68. Ct. opinion setting case for trial on the merits issued March 19, 1971.

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John C. deArmas, Jr., P. A. McKenna, 63 I.D. 82 (1956)

Patrick A. McKenna v. *Clarence A. Davis*, Civil No. 2125–56, Judgment for defendant, June 20, 1957; aff'd., 259 F. 2d 780 (1958); *cert. denied*, 358 U.S. 385 (1958).

The Dredge Corp., 64 I.D. 368 (1957); 65 I.D. 336 (1958)

The Dredge Corp. v. *J. Russell Penny*, Civil No. 475, D. Nev. Judgment for defendant, September 9, 1964; aff'd., 362 F. 2d 889 (9th Cir. 1966); no petition. *See also, Dredge Co.* v. *Husite Co.*, 369 P. 2d 676 (1962); *cert. den.*, 371 U.S. 821 (1962).

Eastern Associated Coal Corp., 82 I.D. 22 (1975)

International Union of United Mine Workers of America v. *Rogers C. B. Morton, Secretary of the Interior*, No. 75–1107, United States Ct. of Appeals D.C. Cir. Dismissed by stipulation, October 29, 1975.

Eastern Associated Coal Corp., 82 I.D. 311 (1975)

United Mine Workers of America v. *Interior Board of Mine Operations Appeals*, No. 75–1727, United States Ct. of Appeals, D.C. Cir. Petition for Review withdrawn, July 28, 1975.

David H. Evans v. *Ralph C. Little*, A-31044 (April 10, 1970), 1 IBLA 269; 78 I.D. 47 (1971)

David H. Evans v. *Rogers C. B. Morton*, Civil No. 1–71–41, D. Idaho. Order granting motion of Ralph C. Little for leave to intervene as a party defendant issued June 5, 1972. Judgment for defendants, July 27, 1973; aff'd., March 12, 1975; no petition.

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John J. Farrelly & The Fifty-One Oil Co. v. *Douglas McKay*, Civil No. 3037–55. Judgment for plaintiff, October 11, 1955, no appeal.

T. Jack Foster, 75 I.D. 81 (1968)

Gladys H. Foster, Executrix of the estate of T. Jack Foster v. *Stewart L. Udall, Boyd L. Rasmussen*, Civil No. 7611, D. N.M. Judgment for plaintiff, June 2, 1969; no appeal.

Franco Western Oil Co., et al., 65 I.D. 316, 427 (1958)

Raymond J. Hansen v. *Fred A. Seaton*, Civil No. 2810–59. Judgment for plaintiff, August 2, 1960 (opinion); no appeal.

See Safarik v. *Udall*, 304 F. 2d 944 (1962); *cert. denied*, 371 U.S. 901 (1962).

Gabbs Exploration Co., 67 I.D. 160 (1960)

Gabbs Exploration Co. v. *Stewart L. Udall*, Civil No. 219–61. Judgment for defendant, December 1, 1961; aff'd., 315 F. 2d 37 (1963); *cert. denied*, 375 U.S. 822 (1963).

Stanley Garthofner, Duvall Bros., 67 I.D. 4 (1960)

Stanley Garthofner v. *Stewart L. Udall*, Civil No. 4194–60. Judgment for plaintiff, November 27, 1961; no appeal.

Estate of Gei-kaun-mah (Bert), 82 I.D. 408 (1975)

Juanita Geikaunmah Mammedaty & Imogene Geikaunmah Carter v. *Rogers C. B. Morton, Secretary of the Interior*, Civil No. CIV 75–1010–E, W. D. Okla. Suit pending.

General Excavating Co., 67 I.D. 344 (1960)

General Excavating Co. v. *U.S.*, Ct. Cl. No. 170–62. Dismissed with prejudice December 16, 1963.

Nelson A. Gerttula, 64 I.D. 225 (1957)

Nelson A. Gerttula v. *Stewart L. Udall*, Civil No. 685–60. Judgment for defendant, June 20, 1961; motion for rehearing denied, August 3, 1961; aff'd., 309 F. 2d 653 (1962); no petition.

Charles B. Gonsales, et al Western Oil Fields, Inc., et al., 69 I.D. 236 (1962)

Pan American Petroleum Corp. & Charles B. Gonsales v. *Stewart L. Udall*, Civil No. 5246, D. N.M. Judgment for defendant, June 4, 1964; aff'd., 352 F. 2d 32 (10th Cir. 1965); no petition.

James C. Goodwin, 80 I.D. 7 (1973)

James C. Goodwin v. *Dale R. Andrus, State Dir., Bureau of Land Management, Burton W. Silcock, Dir. Bureau of Land Management, & Rogers C. B. Morton, Secretary of the Interior*, Civil No. C–5105, D. Colo. Dismissed, November 29, 1975 (opinion).

Gulf Oil Corp., 69 I.D. 30 (1962)

Southwestern Petroleum Corp. v. *Stewart L. Udall*, Civil No. 2209–62. Judgment for defendant, October 19, 1962; aff'd., 325 F. 2d 633 (1963); no petition.

Guthrie Electrical Construction, 62 I.D. 280 (1955), IBCA-22 (Supp.) (March 30, 1956)

Guthrie Electrical Construction Co. v. *U.S.*, Ct. Cl. No. 129–58. Stipulation of settlement filed September 11, 1958. Compromised offer accepted and case closed October 10, 1958.

L. H. Hagood, et al., 65 I.D. 405 (1958)

Edwin Still, et al. v. *U.S.*, Civil No. 7897, D. Colo. Compromise accepted.

Raymond J. Hansen, et al., 67 I.D. 362 (1960)

Raymond J. Hansen, et al. v. *Stewart L. Udall*, Civil No. 3902–60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); *cert. denied*, 371 U.S. 901 (1962).

Robert Schulein v. *Stewart L. Udall*, Civil No. 4131–60. Judgment for defendant, June 23, 1961; aff'd., 304 F. 2d 944 (1962); no petition.

Billy K. Hatfield, et al. v. *Southern Ohio Coal Co.*, 82 I.D. 289 (1975)

District 6 United Mine Workers of America, et al. v. *U.S. Dept. of Interior Board of Mine Operations Appeals*, No. 75–1704, U.S. Court of Appeals, D. C. Cir. Suit pending.

Kenneth Holt, an individual, etc., 68 I.D. 148 (1961)

Kenneth Holt, etc. v. *U.S.*, Ct. Cl. No. 162–62. Stipulated judgment, July 2, 1965.

Hope Natural Gas Co., 70 I.D. 228 (1963)

Hope Natural Gas Co., v. *Stewart L. Udall*, Civil No. 2132–63.

Consolidated Gas Supply Corp. v. *Stewart L. Udall, et al.*, Civil No. 2109–63. Judgment for defendant, September 20, 1965; Per curiam decision, aff'd., April 28, 1966; no petition.

Boyd L. Hulse v. *William H. Griggs*, 67 I.D. 212 (1960)

William H. Griggs v. *Michael T. Solan*, Civil No. 3741, D. Idaho. Stipulation for dismissal filed May 15, 1962.

Idaho Desert Land Entries—Indian Hill Group, 72 I.D. 156 (1965), *U.S.* v. *Ollie Mae Shearman, et al.—Idaho Desert Land Entries—Indian Hill Group*, 73 I.D. 386 (1966)

Wallace Reed, et al. v. *Dept. of the Interior, et al.*, Civil No. 1–65–86, D. Idaho. Order denying preliminary injunction, September 3, 1965; dismissed, November 10, 1965; amended complaint filed, September 11, 1967.

U.S. v. *Raymond T. Michener, et al.*, Civil No. 1–65–93, D. Idaho. Dismissed without prejudice, June 6, 1966.

U.S. v. *Hood Corp., et al.*, Civil No. 1–67–97, S.D. Idaho.

Civil Nos. 1–65–86 & 1–67–97 consolidated. Judgment adverse to U.S., July 10, 1970; reversed, 480 F. 2d 634 (9th Cir. 1973); *cert. denied*, 414 U.S. 1064 (1973).

Appeal of Inter Helo, Inc.*, IBCA-713-5-68 (December 30, 1969), 82 I.D. 591 (1975)

John Billmeyer, etc. v. *U.S.*, Ct. Cl. No. 54–74. Remanded with instructions to admit evidence, May 30, 1975.

Interpretation of the Submerged Lands Act, 71 I.D. 20 (1964)

Floyd A. Wallis v. *Stewart L. Udall*, Civil No. 3089–63. Dismissed with prejudice, March 27, 1968.

C. J. Iverson, 82 I.D. 386 (1975)

C. J. Iverson v. *Kent Frizzell, Acting Secretary of the Interior & Dorothy D. Rupe*, Civil No. 75–106–Blg, D. Mont. Suit pending.

J. A. Terteling & Sons, 64 I.D. 466 (1957)

J. A. Terteling & Sons Inc. v. *U.S.*, Ct. Cl. No. 114–59. Judgment for defendant, 390 F. 2d 926 (1968); remaining aspects compromised.

J. D. Armstrong Co., 63 I.D. 289 (1956)

J. D. Armstrong, Inc. v. *U.S.*, Ct. Cl. No. 490–56. Plaintiff's motion to dismiss petition allowed, June 26, 1959.

M. G. Johnson, 78 I.D. 107 (1971) *U.S.* v. *Menzel G. Johnson*, 16 IBLA 234 (1974)

Menzel G. Johnson v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CN–LV–74–158, RDF, D. Nev. Suit pending.

Anguita L. Kluenter, et al., A-30483, November 18, 1965
See Bobby Lee Moore, *et al.*

Leo J. Kottas, Earl Lutzenhiser, 73 I.D. 123 (1966)

Earl M. Lutzenhiser and Leo J. Kottas v. *Stewart L. Udall, et al.*, Civil No. 1371, D. Mont. Judgment for defendant, June 7, 1968; aff'd., 432 F. 2d 328 (9th Cir. 1970); no petition.

Max L. Krueger, Vaughan B. Connelly, 65 I.D. 185 (1958)

Max L. Krueger v. *Fred A. Seaton*, Civil No. 3106–58. Complaint dismissed by plaintiff, June 22, 1959.

W. Dalton La Rue, Sr., 69 I.D. 120 (1962)

W. Dalton La Rue, Sr. v. *Stewart L. Udall*, Civil No. 2784–62. Judgment for defendant, March 6, 1963; aff'd., 324 F. 2d 428 (1963); *cert. denied*, 376 U.S. 907 (1964).

L. B. Samford, Inc., 74 I.D. 86 (1967)

L. B. Samford, Inc. v. *U.S.*, Ct. Cl. No. 393–67. Dismissed, 410 F. 2d 782 (1969); no petition.

Charles Lewellen, 70 I.D. 475 (1963)

Bernard E. Darling v. *Stewart L. Udall*, Civil No. 474–64. Judgment for defendant, October 5, 1964; appeal voluntarily dismissed, March 26, 1965.

Milton H. Lichtenwalner, et al., 69 I.D. 71 (1962)

Kenneth McGahan v. *Stewart L. Udall*, Civil No. A–21–63, D. Alas. Dismissed on merits, April 24, 1964; stipulated dismissal of appeal with prejudice, October 5, 1964.

Merwin E. Liss, et al., 70 I.D. 228 (1963)

Hope Natural Gas Co. v. *Stewart L. Udall*, Civil No. 2132–63.

Consolidated Gas Supply Corp. v. *Stewart L. Udall, et al.*, Civil No. 2109–63. Judgment for defendant, September 20, 1965; per curiam dec., aff'd., April 28, 1966; no petition.

Bess May Lutey, 76 I.D. 37 (1969)

Bess May Lutey, et al. v. *Dept. of Agriculture, BLM, et al.*, Civil No. 1817, D. Mont. Judgment for defendant, December 10, 1970; no appeal.

Elgin A. McKenna Executrix, Estate of Patrick A. McKenna, 74 I.D. 133 (1967)

Mrs. Elgin A. McKenna as Executrix of the Estate of Patrick A. McKenna, Deceased v. *Udall*, Civil No. 2001–67. Judgment for defendant February 14, 1968; aff'd., 418 F. 2d 1171 (1969); no petition.

Mrs. Elgin A. McKenna, Widow and Successor in Interest of Patrick A. McKenna, Deceased v. *Walter J. Hickel, Secretary of the Interior, et al.*, Civil No. 2401, D. Ky. Dismissed with prejudice, May 11, 1970.

A. G. McKinnon, 62 I.D. 164 (1955)

A. G. McKinnon v. *U.S.* Civil No. 9433, D. Ore. Judgment for plaintiff 178 F. Supp. 913 (1959); rev'd., 289 F. 2d 908 (9th Cir. 1961).

Wade McNeil, et al., 64 I.D. 423 (1957)

Wade McNeil v. *Fred A. Seaton*, Civil No. 648–58. Judgment for defendant, June 5, 1959 (opinion); rev'd., 281 F. 2d 931 (1960); no petition.

Wade McNeil v. *Albert K. Leonard, et al.*, Civil No. 2226, D. Mont. Dismissed, 199 F. Supp. 671 (1961); order, April 16, 1962.

Wade McNeil v. *Stewart L. Udall*, Civil No. 678–62. Judgment for defendant, December 13, 1963 (opinion); aff'd., 340 F. 2d 801 (1964); *cert. denied*, 381 U.S. 904 (1965).

Marathon Oil Co., 81 I.D. 447 (1974), *Atlantic Richfield Co., Marathon Oil Co.*, 81 I.D. 447 (1974)

Marathon Oil Co. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74–179, D. Wyo.

Marathon Oil Co. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74–180, D. Wyo.

Atlantic Richfield Co. & Pasco, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. C 74–181, D. Wyo.

Actions consolidated; judgment for plaintiff, December 11, 1975; notice of appeal filed in Civil Nos. C 74–179 & 180.

Salvatore Megna, Guardian, Philip T. Garigan, 65 I.D. 33 (1958)

Salvatore Megna, Guardian etc. v. *Fred A. Seaton*, Civil No. 468–58. Judgment for plaintiff, November 16, 1959; motion for reconsideration denied, December 2, 1959; no appeal.

Philip T. Garigan v. *Stewart L. Udall*, Civil No. 1577 Tux., D. Ariz. Preliminary injunction against defendant, July 27, 1966; supplemental dec. rendered September 7, 1966; judgment for plaintiff, May 16, 1967; no appeal.

Meva Corp., 76 I.D. 205 (1969)

Meva Corp. v. *U.S.*, Ct. Cl. No. 492–69. Judgment for plaintiff, 511 F. 2d 548 (1975).

Duncan Miller, 70 I.D. 1 (1963)

Duncan Miller v. *Stewart L. Udall*, Civil No. 931–63. Dismissed for lack of prosecution, April 21, 1966; no appeal.

Duncan Miller, A-30546 (August 10, 1966), A-30566 (August 11, 1966), and 73 I.D. 211 (1966)

Duncan Miller v. *Udall*, Civil No. C–167–66, D. Utah. Dismissed with prejudice, April 17, 1967; no appeal.

Duncan Miller, Louise Cuccia, 66 I.D. 388 (1959)

Louise Cuccia and Shell Oil Co. v. *Stewart L. Udall*, Civil No. 562–60. Judgment for defendant, June 27, 1961; no appeal.

Duncan Miller, Samuel W. McIntosh, 71 I.D. 121 (1964)

Samuel W. McIntosh v. *Stewart L. Udall*, Civil No. 1522–64. Judgment for defendant, June 29, 1965; no appeal.

Bobby Lee Moore, et al., 72 I.D. 505 (1965) *Anquita L. Kluenter, et al.*, A-30483 (November 18, 1965)

Gary Carson Lewis, etc., et al. v. *General Services Administration, et al.*, Civil No. 3253 S.D. Cal. Judgment for defendant, April 12, 1965; aff'd., 377 F. 2d 499 (9th Cir. 1967); no petition.

Henry S. Morgan, et al., 65 I.D. 369 (1958)

Henry S. Morgan v. *Stewart L. Udall*, Civil No. 3248–59. Judgment for defendant, February 20, 1961 (opinion); aff'd., 306 F. 2d 799 (1962); *cert. denied*, 371 U.S. 941 (1962).

Morrison-Knudsen Co., 64 I.D. 185 (1957)

Morrison-Knudsen Co. Inc. v. *U.S.*, Ct. Cl. No. 239–61. Remanded to Trial Commr., 345 F. 2d 833 (1965); Commr's. report adverse to U.S. issued June 20, 1967; judgment for plaintiff, 397 F. 2d 826 (1968); part remanded to the Board of Contract Appeals; stipulated dismissal on October 6, 1969; judgment for plaintiff, February 17, 1970.

Navajo Tribe of Indians v. *State of Utah*, 80 I.D. 441 (1973)

Navajo Tribe of Indians v. *Rogers C. B. Morton, Secretary of the Interior, Joan B. Thompson, Martin Ritvo & Frederick Fishman, members of the Board of Land Appeals, Dept. of the Interior*, Civil No. C–308–73, D. Utah. Suit pending.

Richard L. Oelschlaeger, 67 I.D. 237 (1960)

Richard L. Oelschlaeger v. *Stewart L. Udall*, Civil No. 4181–60. Dismissed, November 15, 1963; case reinstated, February 19, 1964; remanded, April 4, 1967; rev'd. & remanded with directions to enter judgment for appellant, 389 F. 2d 974 (1968); *cert. denied*, 392 U.S. 909 (1968).

Oil and Gas Leasing on Lands Withdrawn by Executive Orders for Indian Purposes in Alaska, 70 I.D. 166 (1963)

Mrs. Louise A. Pease v. *Stewart L. Udall*, Civil No. 760–63, D. Alas. Withdrawn, April 18, 1963.

Superior Oil Co. v. *Robert L. Bennett*, Civil No. A–17–63, D. Alas. Dismissed, April 23, 1963.

Native Village of Tyonek v. *Robert L. Bennett*, Civil No. A–15–63, D. Alas. Dismissed, October 11, 1963.

Mrs. Louise A. Pease v. *Stewart L. Udall*, Civil No. A–20–63, D. Alas. Dismissed, October 29, 1963 (oral opinion); aff'd., 332 F. 2d 62 (9th Cir. 1964); no petition.

George L. Gucker v. *Stewart L. Udall*, Civil No. A–39–63, D. Alas. Dismissed without prejudice, March 2, 1964; no appeal.

Old Ben Coal Co., 81 I.D. 428, 81 I.D. 436, 81 I.D. 440 (1974)

Old Ben Coal Corp. v. *Interior Board of Mine Operations Appeals, et al.*, Nos. 74–1654, 74–1655, 74–1656, United States Court of Appeals for the 7th Cir. Board's decision aff'd., June 13, 1975; reconsideration denied, June 27, 1975.

Old Ben Coal Co., 82 I.D. 355 (1975)

United Mine Workers of America v. *U.S. Interior Board of Mine Operations Appeals*, No. 75–1852, United States Court of Appeals, D.C. Circuit. Suit pending.

Paul Jarvis, Inc., 64 I.D. 285 (1957)

Paul Jarvis, Inc. v. *U.S.*, Ct. Cl. No. 40–58. Stipulated judgment for plaintiff, December 19, 1958.

Peter Kiewit Sons' Co., 72 I.D. 415 (1965)

Peter Kiewit Sons' Co. v. *U.S.*, Ct. Cl. 129–66. Judgment for plaintiff, May 24, 1968.

Curtis D. Peters, 80 I.D. 595 (1973)

Curtis D. Peters v. *U.S., Rogers C. B. Morton, as Secretary of the Interior*, Civil No. C–75–0201 RFP, N.D. Cal. Judgment for defendant, December 1, 1975; no appeal.

City of Phoenix v. *Alvin B. Reeves, et al.*, 81 I.D. 65 (1974)

Alvin B. Reeves, Genevieve C. Rippey, Leroy Reeves & Thelma Reeves, as heirs of A. H. Reeves, Deceased v. *Rogers C. B. Morton, Secretary of the Interior, & The City of Phoenix, a municipal Corp.*, Civil No. 74–117 PHX–WPC, D. Ariz. Dismissed with prejudice, August 9, 1974; reconsideration denied, September 24, 1974; no appeal.

Harold Ladd Pierce, 69 I.D. 14 (1962)

Duncan Miller v. *Stewart L. Udall*, Civil No. 1351–62. Judgment for defendant, August 2, 1962; aff'd., 317 F. 2d 573 (1963); no petition.

Port Blakely Mill Co., 71 I.D. 217 (1964)

Port Blakely Mill Co. v. *U.S.*, Civil No. 6205, W.D. Wash. Dismissed with prejudice, December 7, 1964.

Estate of John S. Ramsey (Wap Tose Note) (Nez Perce Allottee No. 853, Deceased) 81 I.D. 298 (1974)

Clara Ramsey Scott v. *U.S. & Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. 3–74–39, D. Idaho. Dismissed with prejudice, August 11, 1975; no appeal.

Ray D. Bolander Co., 72 I.D. 449 (1965)

Ray D. Bolander Co., Inc. v. *U.S.*, Ct. Cl. 51–66. Judgment for plaintiff, December 13, 1968; subsequent Contract Officer's dec., December 3, 1969; interim dec., December 2, 1969; Order to Stay Proceedings until March 31, 1970; dismissed with prejudice, August 3, 1970.

Estate of Crawford J. Reed (Unallotted Crow No. 6412) 1 IBIA 326; 79 I.D. 621 (1972)

George Reed, Sr. v. *Rogers Morton, et al.*, Civil No. 1105, D. Mont. Dismissed, June 14, 1973; no appeal.

Reliable Coal Corp., 1 IBMA 97; 79 I.D. 139 (1972)

Reliable Coal Corp. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, No. 72–1417, United States Court of Appeals for the Fourth Circuit. Suit pending.

Richfield Oil Corp., 62 I.D. 269 (1955)

Richfield Oil Corp. v. *Fred A. Seaton*, Civil No. 3820–55. Dismissed without prejudice, March 6, 1958; no appeal.

Hugh S. Ritter, Thomas M. Bunn, 72 I.D. 111 (1965), Reconsideration denied by letter decision dated June 23, 1967, by the Under Secretary.

Thomas M. Bunn v. *Stewart L. Udall*, Civil No. 2615–65. Remanded, June 28, 1966.

Estate of William Cecil Robedeaux, 1 IBIA 106; 78 I.D. 234 (1971); IBIA-71-5 (Supp-1) (August 16, 1974); 80 I.D. 390 (1973)

Oneta Lamb Robedeaux, et al. v. *Rogers C. B. Morton*, Civil No. 71–646, D. Okla. Dismissed, January 11, 1973.

Houston Bus Hill v. *Rogers C. B. Morton*, Civil No. 72–376, W.D. Okla. Judgment for plaintiff, October 29, 1973; amended judgment for plaintiff, November 12, 1973; appeal dismissed, June 28, 1974.

Houston Bus Hill and Thurman S. Hurst v. *Rogers C. B. Morton, Secretary of the Interior*, Civ. No. 73–528–B, W.D. Okla. Judgment for plaintiff, April 30, 1975; per curiam dec., vacated & remanded, October 2, 1975; judgment for plaintiff, December 1, 1975.

Richard W. Rowe, Daniel Gaudiane, 82 I.D. 174 (1975)

Richard W. Rowe, Daniel Gaudiane v. *Stanley K. Hathaway, in his official capacity as Secretary of the Interior*, Civil No. 75–1152. Suit pending.

San Carlos Mineral Strip, 69 I.D. 195 (1962)

James Houston Bowman v. *Stewart L. Udall*, Civil No. 105–63. Judgment for defendant, 243 F. Supp. 672 (1965); aff'd., sub nom. *S. Jack Hinton, et al.* v. *Stewart L. Udall*, 364 F. 2d 676 (1966); *cert. denied*, 385 U.S. 878 (1966); supplemented by M–36767, November 1, 1967.

Seal and Co., 68 I.D. 94 (1961)

Seal & Co. v. *U.S.*, Ct. Cl. 274–62. Judgment for plaintiff, January 31, 1964; no appeal.

Administrative Appeal of Sessions, Inc. (A Cal. Corp.) v. *Vyola Olinger Ortner (Lessor), Lease No. PSL-33, Joseph Patrick Patencio (Lessor), Lease No. PSL-36, Larry Olinger (Lessor), Lease No. PSL-41*, 81 I.D. 651 (1974)

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CV 74–3589 LTL, C.D. Cal. Suit pending.

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CV 74–3591 MML, C.D. Cal. Suit pending.

Sessions, Inc. v. *Rogers C. B. Morton, Secretary of the Interior, et al.*, Civil No. CV 74–3590 FW, C.D. Cal. Suit pending.

Shell Oil Co., A-30575 (October 31, 1966), *Chargeability of Acreage Embraced in Oil & Gas Lease Offers*, 71 I.D. 337 (1964)

Shell Oil Co. v. *Udall*, Civil No. 216–67. Stipulated dismissal, August 19, 1968.

Sinclair Oil & Gas Co., 75 I.D. 155 (1968)

Sinclair Oil & Gas Co. v. *Stewart L. Udall, Secretary of the Interior, et al.*, Civil No. 5277, D. Wyo. Judgment for defendant, sub nom. *Atlantic Richfield Co.* v. *Walter J. Hickel*, 303 F. Supp. 724 (1969); aff'd., 432 F. 2d 587 (10th Cir. 1970); no petition.

Charles T. Sink, 82 I.D. 545 (1975)

Charles T. Sink v. *Thomas S. Kleppe, Secretary of the Interior—Mining Enforcement & Safety Administration (MESA)*, United States Court of Appeals for the 4th Cir. Suit pending.

Southern Pacific Co., 76 I.D. 1 (1969)

Southern Pacific Co. v. *Walter J. Hickel, Secretary of the Interior*, Civil No. S–1274, D. Cal. Judgment for defendant, December 2, 1970 (opinion); no appeal.

Southern Pacific Co., Louis G. Wedekind, 77 I.D. 177 (1970), 20 IBLA 365 (1975)

George C. Laden, Louis Wedekind, Mrs. Vern Lear, Mrs. Arda Fritz, & Helen Laden Wagner, heirs of George H. Wedekind, Deceased v. *Rogers C. B. Morton, et al.*, Civil No. R–2858, D. Nev. On June 20, 1974 remanded for further agency proceedings as originally ordered in 77 I.D. 177; Dist; Ct. reserves jurisdiction; supplemental complaint filed, August 1, 1975.

Southwest Welding and Manufacturing Division, Yuba Consolidated Industries, Inc., 69 I.D. 173 (1962)

Southwest Welding v. *U.S.*, Civil No. 68–1658–CC, C. D. Cal. Judgment for plaintiff, January 14, 1970; appeal dismissed, April 6, 1970.

Southwestern Petroleum Corp., et al., 71 I.D. 206 (1964)

Southwestern Petroleum Corp. v. *Stewart L. Udall*, Civil No. 5773, D. N.M. Judgment for defendant, March 8, 1965; aff'd., 361 F. 2d 650 (10th Cir. 1966); no petition.

Standard Oil Co. of California, et al., 76 I.D. 271 (1969)

Standard Oil Co. of California v. *Walter J. Hickel, et al.*, Civil No. A–159–69, D. Alas. Judgment for plaintiff, 317 F. Supp. 1192 (1970); aff'd., sub nom. *Standard Oil Co. of California* v. *Rogers C. B. Morton, et al.*, 450 F. 2d 493 (9th Cir. 1971); no petition.

Standard Oil Co. of Texas, 71 I.D. 257 (1964)

California Oil Co. v. *Secretary of the Interior*, Civil No. 5729, D. N.M. Judgment for plaintiff, January 21, 1965; no appeal.

James K. Tallman, 68 I.D. 256 (1961)

James K. Tallman, et al. v. *Stewart L. Udall*, Civil No. 1852–62. Judgment for defendant, November 1, 1962 (opinion); rev'd., 324 F. 2d 411 (1963); *cert. granted*, 376 U.S. 961 (1964); Dist. Ct. aff'd., 380 U.S. 1 (1965); rehearing denied, 380 U.S. 989 (1965).

Texaco, Inc., 75 I.D. 8 (1968)

Texaco, Inc., a Corp. v. *Secretary of the Interior*, Civil No. 446–68. Judgment for plaintiff, 295 F. Supp. 1297 (1969); aff'd., in part & remanded, 437 F. 2d 636 (1970), aff'd. in part & remanded, July 19, 1972.

Texas Construction Co., 64 I.D. 97 (1957) Reconsideration denied, IBCA-73 (June 18, 1957)

Texas Construction Co. v. *U.S.*, Ct. Cl. No. 224–58, Stipulated judgment for plaintiff, December 14, 1961.

Estate of John Thomas, Deceased Cayuse Allottee No. 223 and Estate of Joseph Thomas, Deceased, Umatilla Allottee No. 877, 64 I.D. 401 (1957)

Joe Hayes v. *Fred A. Seaton, Secretary of the Interior*, Civil No. 859–581. Judgment for defendant, September 18, 1958; aff'd., 270 F. 2d 319 (1959); *cert. denied*, 364 U.S. 814 (1960); *rehearing denied*, 364 U.S. 906 (1960).

Thor-Westcliffe Development, Inc., 70 I.D. 134 (1963)

Thor-Westcliffe Development, Inc. v. *Stewart L. Udall*, Civil No. 5343, D. N.M. Dismissed with prejudice June 25, 1963.

See also:

Thor-Westcliffe Development, Inc. v. *Stewart L. Udall, et al.*, Civil No. 2406–61. Judgment for defendant, March 22, 1962; aff'd., 314 F. 2d 257 (1963); *cert. denied*, 373 U.S. 951 (1963).

Richard K. Todd, et al., 68 I.D. 291 (1961)

Bert F. Duesing v. *Stewart L. Udall*, Civil No. 290–62. Judgment for defendant, July 17, 1962 (oral opinion); aff'd., 350 F. 2d 748 (1965); *cert denied*, 383 U.S. 912 (1966).

Atwood, et al. v. *Stewart L. Udall*, Civil Nos. 293–62—299–62, incl. Judgment for defendant, August 2, 1962; aff'd., 350 F. 2d 748 (1965); no petition.

Appeal of Toke Cleaners, 81 I.D. 258 (1974)

Thom Properties, Inc., d/b/a Toke Cleaners & Launderers v. *U.S. Government, Dept. of Interior, Bureau of Indian Affairs*, Civil No. A3–74–99, D. N.D. Stipulation for dismissal & order dismissing case, June 16, 1975.

Union Oil Co. Bid on Tract 228, Brazos Area, Texas Offshore Sale, 75 I.D. 147 (1968), 76 I.D. 69 (1969)

The Superior Oil Co., et al. v. *Stewart L. Udall*, Civil No. 1521–68. Judgment for plaintiff, July 29, 1968, modified, July 31, 1968; aff'd., 409 F. 2d 1115 (1969); dismissed as moot, June 4, 1969; no petition.

Union Oil Co. of California, Ramon P. Colvert, 65 I.D. 245 (1958)

Union Oil Co. of California v. *Stewart L. Udall*, Civil No. 3042–58. Judgment for defendant, May 2, 1960 (opinion); aff'd., 289 F. 2d 790 (1961); no petition.

Union Oil Company of California et al., 71 I.D. 169 (1964), 72 I.D. 313 (1965)

Penelope Chase Brown, et al. v. *Stewart Udall*, Civil No. 9202, D. Colo. Judgment for plaintiff, 261 F. Supp. 954 (1966); aff'd., 406 F. 2d 759 (10th Cir. 1969); *cert granted*, 396 U.S. 817 (1969); rev'd. & remanded, 400 U.S. 48 (1970); remanded to Dist. Ct., March 12, 1971; judgment for plaintiff, 370 F. Supp. 108, (1973); vacated & remanded, September 22, 1975; petition for rehearing *en banc* filed.

Equity Oil Co. v. *Stewart L. Udall*, Civil No. 9462, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

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Cain *et al. v.* Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62.

California and Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453.

California, State of (14 L.D. 253); vacated, 23 L.D. 230.

California, State of (15 L.D. 10); overruled, 23 L.D. 423.

California, State of (19 L.D. 585); vacated, 28 L.D. 57.

California, State of (22 L.D. 428); overruled, 32 L.D. 34.

*California, State of (32 L.D. 346); vacated, 50 L.D. 628 (See 37 L.D. 499 and 46 L.D. 396).

California, State of (44 L.D. 118); overruled, 48 L.D. 98.

California, State of (44 L.D. 468); overruled, 48 L.D. 98.

California, State of *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335.

California, State of *v.* Pierce (9 C.L.O. 118); modified, 2 L.D. 854.

California, State of *v.* Smith (5 L.D. 543); overruled, 18 L.D. 343.

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Cameron Lode (13 L.D. 369); over-

ruled so far as in conflict, 25 L.D. 518.
Camplan *v.* Northern Pacific R.R. Co. 28 L.D. 118); overruled so far as in conflict, 29 L.D. 550.
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Castello *v.* Bonnie (20 L.D. 311); overruled, 22 L.D. 174.
Cate *v.* Northern Pacific Ry Co. (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60.
Cawood *v.* Dumas (22 L.D. 585); vacated, 25 L.D. 526.
Centerville Mining and Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17.
Central Pacific R.R. Co. (29 L.D. 589); modified, 48 L.D. 58.
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Chapman *v.* Willamette Valley and Cascade Mountain Wagon Road Co. (13 L.D. 61); overruled, 20 L.D. 259.
Chappel *v.* Clark (27 L.D. 334); modified, 27 L.D. 532.
Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 543.
Childress *et al. v.* Smith (15 L.D. 89); overruled, 26 L.D. 453.
Chittenden, Frank O., and Interstate Oil Corp. (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.
Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.
Clafin *v.* Thompson (28 L.D. 279); overruled, 29 L.D. 693.
Claney *v.* Ragland (38 L.D. 550) (See 43 L.D. 485).
Clark, Yulu S. *et al.* (A–22852) February 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51.
Clayton, Phebus (48 L.D. 128) (1921); overruled to extent inconsistent, 70 I.D. 159.
Cline *v.* Urban (29 L.D. 96); overruled, 46 L.D. 492.
Clipper Mining Co. (22 L.D. 527); no longer followed in part, 67 I.D. 417.
Clipper Mining Co. *v.* The Eli Mining and Land Co. *et al.* (33 L.D. 660); no longer followed in part, 67 I.D. 417.
Cochran *v.* Dwyer (9 L.D. 478) (See 39 L.D. 162, 225).
Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153.
Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51.
Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408.
Condict, W. C. *et al.* (A–23366) June 24, 1942, unreported; overruled so far as in conflict, 59 I.D. 258–260.
Cook, Thomas C. (10 L.D. 324) (See 39 L.D. 162, 225).
Cooke *v.* Villa (17 L.D. 210); vacated, 19 L.D. 442.
Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113.
Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27) (See 39 L.D. 574).
Copper Glance Lode (29 L.D. 542); overruled so far as in conflict, 55 I.D. 348.
Corlis *v.* Northern Pacific R.R. Co. (23 L.D. 265); vacated, 26 L.D. 652.
Cornell *v.* Chilton (1 L.D. 153); overruled, 6 L.D. 483.
Cowles *v.* Huff (24 L.D. 81); modified, 28 L.D. 515.
Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114.
Crowston *v.* Seal (5 L.D. 213); overruled, 18 L.D. 586.
Culligan *v.* State of Minnesota (34 L.D. 22); modified, 34 L.D. 151.
Cunningham, John (32 L.D. 207); modified, 32 L.D. 456.
Dailey Clay Products Co., The (48

L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656.

Dakota Central R.R. Co. *v.* Downey (8 L.D. 115); modified, 20 L.D. 131.

Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110.

DeLong *v.* Clarke (41 L.D. 278); modified so far as in conflict, 45 L.D. 54.

Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300.

Denison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122.

Deseret Irrigation Co. *et al. v.* Sevier River Land and Water Co. (40 L.D. 463); overruled, 51 L.D. 27.

Devoe, Lizzie A. (5 L.D. 4); modified, 5 L.D. 429.

Dickey, Ella I. (22 L.D. 351); overruled, 32 L.D. 331.

Dierks, Herbert (36 L.D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.

Dixon *v.* Dry Gulch Irrigation Co. (45 L.D. 4); overruled, 51 L.D. 27.

Douglas and Other Lodes (34 L.D. 556); modified, 43 L.D. 128.

Dowman *v.* Moss (19 L.D. 526); overruled, 25 L.D. 82.

Dudymott *v.* Kansas Pacific R.R. Co. (5 C.L.O. 69); overruled so far as in conflict, 1 L.D. 345.

Dumphy, Elijah M. (8 L.D. 102); overruled so far as in conflict, 36 L.D. 561.

Dyche *v.* Beleele (24 L.D. 494); modified, 43 L.D. 56.

Dysart, Francis J. (23 L.D. 282); modified, 25 L.D. 188.

Easton, Francis E. (27 L.D. 600); overruled, 30 L.D. 355.

East Tintic Consolidated Mining Co. (41 L.D. 255); vacated, 43 L.D. 80.

*Elliot *v.* Ryan (7 L.D. 322); overruled, 8 L.D. 110 (See 9 L.D. 360).

El Paso Brick Co. (37 L.D. 155); overruled so far as in conflict, 40 L.D. 199.

Elson, William C. (6 L.D. 797); overruled, 37 L.D. 330.

Emblem *v.* Reed (16 L.D. 28); modified, 17 L.D. 220.

Epley *v.* Trick (8 L.D. 110); overruled, 9 L.D. 360.

Erhardt, Finsans (36 L.D. 154); overruled, 38 L.D. 406.

Esping *v.* Johnson (37 L.D. 709); overruled, 41 L.D. 289.

Ewing *v.* Rickard (1 L.D 146); overruled, 6 L.D. 483.

Falconer *v.* Price (19 L.D. 167); overruled, 24 L.D. 264.

Fargo No. 2 Lode Claims (37 L.D. 404); modified, 43 L.D. 128; overruled so far as in conflict, 55 I.D. 348.

Farrill, John W. (13 L.D. 713); overruled so far as in conflict, 52 L.D. 473.

Febes, James H. (37 L.D. 210); overruled, 43 L.D. 183.

Federal Shale Oil Co. (53 I.D. 213); overruled so far as in conflict, 55 I.D. 290.

Ferrell *et al. v.* Hoge *et al.* (18 L.D. 81); overruled, 25 L.D. 351.

Fette *v.* Christiansen (29 L.D. 710); overruled, 34 L.D. 167.

Field, William C. (1 L.D. 68); overruled so far as in conflict, 52 L.D. 473.

Filtrol Company *v.* Brittan and Echart (51 L.D. 649); distinguished, 55 I.D. 605.

Fish, Mary (10 L.D. 606); modified, 13 L.D. 511.

Fisher *v.* Heirs of Rule (42 L.D. 62, 64); vacated, 43 L.D. 217.

Fitch *v.* Sioux City and Pacific R.R. Co. (216 L. and R. 184); overruled, 17 L.D. 43.

Fleming *v.* Bowe (13 L.D. 78); overruled, 23 L.D. 175.

Florida Mesa Ditch Co. (14 L.D. 265); overruled, 27 L.D. 421.

Florida Railway and Navigation Co. *v.* Miller (3 L.D. 324); modified, 6 L.D. 716; overruled, 9 L.D. 237.

Florida, State of (17 L.D. 355); reversed, 19 L.D. 76.
Florida, State of (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.
Forgeot, Margaret (7 L.D. 280); overruled, 10 L.D. 629.
Fort Boise Hay Reservation (6 L.D. 16); overruled, 27 L.D. 505.
Franco-Western Oil Company *et al.* (Supp.), 65 I.D. 427 is adhered to, 66 I.D. 362.
Freeman, Flossie (40 L.D. 106); overruled, 41 L.D. 63.
Freeman *v.* Summers, 52 L.D. 201 (1927), is overruled; United States *v.* Winegar, Frank W. *et al.*, 16 IBLA 112 (June 28, 1974), 81 I.D. 370.
Freeman *v.* Texas and Pacific Ry. Co. (2 L.D. 550); overruled, 7 L.D. 18.
Fry, Silas A. (45 L.D. 20); modified, 51 L.D. 581.
Fults, Bill, 61 I.D. 437 (1954); overruled, 69 I.D. 181.

Galliher, Maria (8 C.L.O. 137); overruled, 1 L.D. 57.
Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
Gariss *v.* Borin (21 L.D. 542) (See 39 L.D. 162, 225).
Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
Glassford, A. W. *et al.*, 56 I.D. 88 (1937); overruled to extent inconsistent, 70 I.D. 159.
Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 422.
Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
Goodale *v.* Olney (12 L.D. 324); distinguished, 55 I.D. 580.
Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
Gowdy *et al. v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
Gregg *et al. v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
Grinnel *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
*Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568 (See R.R. Rousseau, 47 L.D. 590).
Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.
Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
Gwyn, James R. (A–26806) December 17, 1953, unreported; distinguished, 66 I.D. 275.

Hagood, L. N., *et al.*, 65 I.D. 405 (1958); overruled, Beard Oil Company, 1 IBLA 42, 77 I.D. 166 (1970).
Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 698.
Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.

Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.

Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.

Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427 (See 49 L.D. 413).

Hastings and Dakota Ry. Co. *v.* Christenson *et al.* (22 L.D. 257); overruled, 28 L.D. 572.

Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.

Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.

Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 I.D. 150.

Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.

Heinzman *et al. v.* Letroadec's Heirs *et al.* (28 L.D. 497); overruled, 38 L.D. 253.

Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.

Heirs of Mulnix, Philip (33 L.D. 331); overruled, 43 L.D. 532.

*Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.

Heirs of Vradenberg *et al. v.* Orr *et al.* (25 L.D. 232); overruled, 38 L.D. 253.

Helmer, Inkerman (34 L.D. 341); modified, 42 L.D. 472.

Helphrey *v.* Coil (49 L.D. 624); overruled, Dennis *v.* Jean (A–20899), July 24, 1937, unreported.

Henderson, John W. (40 L.D. 518); vacated, 43 L.D. 106 (See 44 L.D. 112 and 49 L.D. 484).

Hennig, Nellie J. (38 L.D. 443, 445); recalled and vacated, 39 L.D. 211.

Hensel, Ohmer V. (45 L.D. 557); distinguished, 66 I.D. 275.

Herman *v.* Chase *et al.* (37 L.D. 590); overruled, 43 L.D. 246.

Herrick, Wallace H. (24 L.D. 23); overruled, 25 L.D. 113.

Hess, Hoy, Assignee (46 L.D. 421); overruled, 51 L.D. 287.

Hickey, M. A. *et al.* (3 L.D. 83); modified, 5 L.D. 256.

Hildreth, Henry (45 L.D. 464); vacated, 46 L.D. 17.

Hindman, Ada I. (42 L.D. 327); vacated in part, 43 L.D. 191.

Hoglund, Svan (42 L.D. 405); vacated, 43 L.D. 538.

Holbeck, Halvor F., A–30376 (December 2, 1965); overruled, 79 I.D. 416 (1972).

Holden, Thomas A. (16 L.D. 493); overruled, 29 L.D. 166.

Holland, G. W. (6 L.D. 20); overruled, 6 L.D. 639; 12 L.D. 436.

Holland, William C. (M–27696); decided April 26, 1934; overruled in part, 55 I.D. 221.

Hollensteiner, Walter (38 L.D. 319); overruled, 47 L.D. 260.

Holman *v.* Central Montana Mines Co. (34 L.D. 568); overruled so far as in conflict, 47 L.D. 590.

Hon *v.* Martinas (41 L.D. 119); modified, 43 L.D. 197.

Hooper, Henry (6 L.D. 624); modified, 19 L.D. 86, 284.

Howard *v.* Northern Pacific R.R. Co. 23 L.D. 6); overruled, 28 L.D. 126.

Howard, Thomas (3 L.D. 409) (See 39 L.D. 162, 225).

Howell, John H. (24 L.D. 35); overruled, 28 L.D. 204.

Howell L. C. (39 L.D. 92) (See 39 L.D. 411).

Hoy, Assignee of Hess (46 L.D. 421); overruled, 51 L.D. 287.

*Hughes *v.* Greathead (43 L.D. 497); overruled, 49 L.D. 413 (See 260 U.S. 427).

Hull *et al. v.* Ingle (24 L.D. 214); overruled, 30 L.D. 258.

Huls, Clara (9 L.D. 401); modified, 21 L.D. 377.

Humble Oil & Refining Co. (64 L.D. 5); distinguished, 65 I.D. 316.

Hunter, Charles H. (60 I.D. 395); distinguished, 63 I.D. 65.

Hurley, Bertha C. (TA–66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.

Hyde, F. A. (27 L.D. 472); vacated, 28 L.D. 284.

Hyde, F. A. *et al.* (40 L.D. 284); overruled, 43 L.D. 381.

*Hyde *et al. v.* Warren *et al.* (14 L.D. 576; 15 L.D. 415) (See 19 L.D. 64).

*Ingram, John D. (37 L.D. 475) (See 43 L.D. 544).

Inman *v.* Northern Pacific R.R. Co. (24 L.D. 318); overruled, 28 L.D. 95.

*Instructions (32 L.D. 604); overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson *et al.* (A–20411), August 5, 1937, unreported (See 59 I.D. 282, 286).

Instructions (51 L.D. 51); overruled so far as in conflict, 54 I.D. 36.

Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262); overruled so far as in conflict, 53 I.D. 228.

Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125); vacated, 29 L.D. 79.

Jacks *v.* Belard *et al.* (29 L.D. 369); vacated, 30 L.D. 345.

Jackson Oil Co. *v.* Southern Pacific Ry. Co. (40 L.D. 528); overruled, 42 L.D. 317.

Johnson *v.* South Dakota (17 L.D. 411); overruled so far as in conflict, 41 L.D. 22.

Jones, James A. (3 L.D. 176); overruled, 8 L.D. 448.

Jones *v.* Kennett (6 L.D. 688); overruled, 14 L.D. 429.

Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.

Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 I.D. 371.

Keating Gold Mining Company, Montana Power Company, Transferee, 52 L.D. 671 (1929), overruled in part, Arizona Public Service Company, 5 IBLA 137, 79 I.D. 67 (1972).

Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 I.D. 417, 419.

Kemper *v.* St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.

Kilner, Harold E. *et al.* (A–21845); February 1, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.

King *v.* Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.

Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 I.D. 228.

Kinsinger *v.* Peck (11 L.D. 202) (See 39 L.D. 162, 225).

Kiser *v.* Keech (7 L.D. 25); overruled, 23 L.D. 119.

Knight, Albert B. *et al.* (30 L.D. 227); overruled, 31 L.D. 64.

Knight *v.* Heirs of Knight (39 L.D. 362, 491); 40 L.D. 461; overruled, 43 L.D. 242.

Kniskern *v.* Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.

Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.

Krighaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.

*Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).

Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.

La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.

Lamb *v.* Ullery (10 L.D. 528); overruled, 32 L.D. 331.

Largent, Edward B. *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.

Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.

Lasselle *v.* Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.

Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.

Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.

Laughlin *v.* Martin (18 L.D. 112); modified, 21 L.D. 40.

Law *v.* State of Utah (29 L.D. 623); overruled, 47 L.D. 359.

Layne and Bowler Export Corp., IBCA–245 (Jan. 18, 1961), 68 I.D. 33, overruled in so far as it conflicts with Schweigert, Inc. *v.* United States, Court of Claims No. 26–66 (Dec. 15, 1967), and Galland-Henning Manufacturing Company, IBCA–534–12–65 (Mar. 29, 1968).

Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.

Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.

Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.

Lindermann *v.* Wait (6 L.D. 689); overruled, 13 L.D. 459.

*Linhart *v.* Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536).

Liss, Merwin E., Cumberland & Allegheny Gas Company, 67 I.D. 385 (1960), is overruled, 80 I.D. 395 (1973).

Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.

Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.

Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.

Lonnergran *v.* Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.

Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.

Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.

Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.

Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.

Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.

Luse, Jeanette L. *et al.* (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243.

Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.

Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.

Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 713.

Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.

Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.

Maginnis, John S. (32 L.D. 14); modified (42 L.D. 472).

Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.

Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.

Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.

Makemson *v.* Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.

Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.

Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.

Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.

Martin *v.* Patrick (41 L.D. 284); overruled, 43 L.D. 536.

Mason *v.* Cromwell (24 L.D. 248); vacated, 26 L.D. 369.

Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.

Mather *et al. v.* Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.

Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.

Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.

McBride *v.* Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.

McCalla *v.* Acker (29 L.D. 203); vacated, 30 L.D. 277.

McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.

McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.

*McCraney *v.* Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.

*McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616 (See 35 L.D. 399).

McFadden *et al. v.* Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.

McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.

McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.

McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.

McHarry *v.* Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.

McKernan *v.* Bailey (16 L.D. 368); overruled, 17 L.D. 494.

*McKittrick Oil Co. *v.* Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).

McMiken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.

McNamara *et al. v.* State of California (17 L.D. 296); overruled, 22 L.D. 666.

McPeek *v.* Sullivan *et al.* (25 L.D. 281); overruled, 36 L.D. 26.

*Mee *v.* Hughart *et al.* (23 L.D. 455); vacated, 28 L.D. 209, In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.

Meeboer *v.* Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

Mercer *v.* Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.

Meyer *v.* Brown (15 L.D. 307) (See 39 L.D. 162, 225).

Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.

Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.

Mikesell, Henry D., A–24112 (Mar. 11, 1946); *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.

Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.

Miller, Duncan, A–29760 (Sept. 18, 1963), overruled, 79 I.D. 416 (1972).

Miller, Duncan, A–30742 (December 2, 1966), overruled, 79 I.D. 416 (1972).

Miller, Duncan, A–30722 (April 14, 1967), overruled, 79 I.D. 416 (1972).

Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.

Miller *v.* Sebastian (19 L.D. 288); overruled, 26 L.D. 448.

Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.

Milton *et al. v.* Lamb (22 L.D. 339); overruled, 25 L.D. 550.

Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.

Miner *v.* Mariott *et al.* (2 L.D. 709); modified, 28 L.D. 224.

Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.

*Mitchell *v.* Brown (3 L.D. 65); overruled, 41 L.D. 396 (See 43 L.D. 520).

Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.

Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 I.D. 348.

Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.

Morgan *v.* Craig (10 C.L.O. 234); overruled, 5 L.D. 303.

Morgan, Henry S. *et al.* (65 I.D. 369); overruled to extent inconsistent, 71 I.D. 22 (1964).

Morgan *v.* Rowland (37 L.D. 90); overruled, 37 L.D. 618.

Moritz *v.* Hinz (36 L.D. 450); vacated, 37 L.D. 382.

Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.

Morrow *et al. v.* State of Oregon *et al.* (32 L.D. 54); modified, 33 L.D. 101.

Moses, Zelmer R. (36 L.D. 473); overruled, 44 L.D. 570.

Mountain Chief Nos. 8 and 9 Lode Claims (36 L.D. 100); overruled in part, 36 L.D. 551.

Mountain Fuel Supply Company, A-31053 (December 19, 1969), overruled, 79 I.D. 416 (1972).

Mt. Whitney Military Reservation (40 L.D. 315) (See 43 L.D. 33).

Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.

Muller, Esberne K. (39 L.D. 72); modified, 39 L.D. 360.

Mulnix, Philip, Heirs of (33 L.D. 331); overruled, 43 L.D. 532.

Munsey, Glenn, Earnest Scott and Arnold Scott *v.* Smitty Baker Coal Company, Inc., 1 IBMA 144, 162 (Aug. 8, 1972), 79 I.D. 501, 509, distinguished, 80 I.D. 251 (1973).

Myll, Clifton O., 71 I.D. 458 (1964); as supplemented, 71 I.D. 486 (1964), vacated, 72 I.D. 536 (1965).

National Livestock Company and Zack Cox, I.G.D. 55 (1938), is overruled, United States *v.* Maher, Charles *et al.*, 5 IBLA 209, 79 I.D. 109 (1972).

Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971); Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Nebraska, State of (18 L.D. 124); overruled, 28 L.D. 358.

Nebraska, State of *v.* Dorrington (2 C.L.L. 647); overruled, 26 L.D. 123.

Neilsen *v.* Central Pacific R.R. Co. *et al.* (26 L.D. 252); modified, 30 L.D. 216.

Newbanks *v.* Thompson (22 L.D. 490); overruled, 29 L.D. 108.

Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.

New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.

New Mexico, State of (49 L.D. 314); overruled, 54 I.D. 159.

Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.

New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.

*Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (See 42 L.D. 313).

Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 234; overruled so far as in conflict, 29 L.D. 550.

*Northern Pacific R.R. Co. (21 L.D. 412, 23 L.D. 204; 25 L.D. 501); overruled, 53 I.D. 242 (See 26 L.D. 265; 33 L.D. 426; 44 L.D. 218; 117 U.S. 435).

Northern Pacific R.R. Co. *v.* Bowman (7 L.D. 238); modified, 18 L.D. 224.

Northern Pacific R.R. Co. *v.* Burns (6 L.D. 21); overruled, 20 L.D. 191.

Northern Pacific R.R. Co. *v.* Loomis (21 L.D. 395); overruled, 27 L.D. 464.

Northern Pacific R.R. Co. *v.* Marshall *et al.* (17 L.D. 545); overruled, 28 L.D. 174.

Northern Pacific R.R. Co. *v.* Miller (7 L.D. 100); overruled so far as in conflict, 16 L.D. 229.

Northern Pacific R.R. Co. *v.* Sherwood (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.

Northern Pacific R.R. Co. *v.* Symons (22 L.D. 686); overruled, 28 L.D. 95.

Northern Pacific R.R. Co. *v.* Urquhart (8 L.D. 365); overruled, 28 L.D. 126.

Northern Pacific R.R. Co. *v.* Walters *et al.* (13 L.D. 230); overruled so far as in conflict, 49 L.D. 391.

Northern Pacific R.R. Co. *v.* Yantis (8 L.D. 58); overruled, 12 L.D. 127.

*Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).

Nunez, Roman C. and Serapio (56 I.D. 363); overruled so far as in conflict, 57 I.D. 213.

Nyman *v.* St. Paul, Minneapolis, and Manitoba Ry. Co. (5 L.D. 396); overruled, 6 L.D. 750.

O'Donnell, Thomas J. (28 L.D. 214); overruled, 35 L.D. 411.

Olson *v.* Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.

Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.

Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.

*Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).

Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).

Opinion of Associate Solicitor, M–36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).

Opinion of Associate Solicitor, M–36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.

Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372 (1961).

Opinion of Secretary, 75 I.D. 147 (1968); vacated, 76 I.D. 69 (1969).

Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.

Opinion of Solicitor, February 7, 1919 (D–44083); overruled, November 4, 1921 (M–6397) (See 58 I.D. 158, 160).

Opinion of Solicitor, August 8, 1933 (M–27499); overruled so far as in conflict, 54 I.D. 402.

Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M–36410).

Opinion of Solicitor, Oct. 25, 1934, 55 I.D. 14, overruled so far as inconsistent, 77 I.D. 49 (1970).

Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.

Opinion of Solicitor, August 31, 1943 (M–33183); distinguished, 58 I.D. 726, 729.

Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.

Opinion of Solicitor, March 28, 1949 (M–35093); overruled in part, 64 I.D. 70.

Opinion of Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).

Opinion of Solicitor, M–36051 (December 7, 1950), modified; Solicitor's Opinion, M–36863, 79 I.D. 513 (1972).

Opinion of Solicitor, Jan. 19, 1956 (M–36378); overruled to extent inconsistent, 64 I.D. 57.

Opinion of Solicitor, June 4, 1957 (M–36443); overruled in part, 65 I.D. 316.

Opinion of Solicitor, July 9, 1957 (M–36442); withdrawn and superseded, 65 I.D. 386, 388.

Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M–36429); no longer followed, 67 I.D. 366 (1960).

Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M–36706, 74 I.D. 165 (1967).

Opinion of Solicitor, 64 I.D. 435 (1957), will not be followed to the extent that it conflicts with these views M–36456 (Supp.) (Feb. 18, 1969), 76 I.D. 14 (1969).

Opinion of Solicitor, July 29, 1958 (M–36512); overruled to extent inconsistent, 70 I.D. 159 (1963).

Opinion of Solicitor, Oct 27, 1958 (M–36531); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, July 20, 1959 (M–36531, Supp.); overruled, 69 I.D. 110 (1962).

Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).

Opinion of Solicitor, M–36767 (Nov. 1, 1967) (supplementing, M–36599), 69 I.D. 195 (1962).

Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D–43035,

May Caramony) (See 58 I.D. 149, 154–156).
Oregon and California R.R. Co. *v.* Puckett (39 L.D. 169); modified, 53 I.D. 264.
Oregon Central Military Wagon Road Co. *v.* Hart (17 L.D. 480); overruled, 18 L.D. 543.
Owens *et al. v.* State of California (22 L.D. 369); overruled, 38 L.D. 253.

Pace *v.* Carstarphen *et al*, (50 L.D. 369); distinguished, 61 I.D. 459.
Pacific Slope Lode (12 L.D. 686); overruled so far as in conflict, 25 L.D. 518.
Page, Ralph, 8 IBLA 435 (Dec. 22, 1972), explained; Sam Rosetti, 15 IBLA 288, 81 I.D. 251 (1974).
Papina *v.* Alderson (1 B.L.P. 91); modified, 5 L.D. 256.
Patterson, Charles E. (3 L.D. 260); modified, 6 L.D. 284, 624.
Paul Jarvis, Inc., Appeal of (64 I.D. 285); distinguished, 64 I.D. 388.
Paul Jones Lode (28 L.D. 120); modified, 31 L.D. 359.
Paul *v.* Wiseman (21 L.D. 12); overruled, 27 L.D. 522.
Pecos Irrigation and Improvement Co. (15 L.D. 470); overruled, 18 L.D. 168, 268.
Pennock, Belle L. (42 L.D. 315); vacated, 43 L.D. 66.
Perry *v.* Central Pacific R.R. Co. (39 L.D. 5); overruled so far as in conflict, 47 L.D. 304.
Phebus, Clayton (48 L.D. 128); overruled so far as in conflict, 50 L.D. 281; overruled to extent inconsistent, 70 I.D. 159.
Phelps, W. L. (8 C.L.O. 139); overruled, 2 L.D. 854.
Phillips, Alonzo (2 L.D. 321); overruled, 15 L.D. 424.
Phillips *v.* Breazeale's Heirs (19 L.D. 573); overruled, 39 L.D. 93.
Phillips, Cecil H., A–30851 (November 16, 1967), overruled, 79 I.D. 416 (1972).
Phillips, Vance W., 14 IBLA 79 (Dec. 11, 1973), is modified by Vance W. Phillips and Aelisa A. Burham, 19 IBLA 211 (Mar. 21, 1975).
Pieper, Agnes C. (35 L.D. 459); overruled, 43 L.D. 374.
Pierce, Lewis W. (18 L.D. 328); vacated, 53 I.D. 447; overruled so far as in conflict, 59 I.D. 416, 442.
Pietkiewicz *et al. v.* Richmond (29 L.D. 195); overruled, 37 L.D. 145.
Pike's Peak Lode (10 L.D. 200); overruled in part, 20 L.D. 204.
Pike's Peak Lode (14 L.D. 47); overruled, 20 L.D. 204.
Popple, James (12 L.D. 433); overruled, 13 L.D. 588.
Powell, D. C. (6 L.D. 302); modified, 15 L.D. 477.
Prange, Christ C. and William C. Braasch (48 L.D. 488); overruled so far as in conflict, 60 I.D. 417, 419.
Premo, George (9 L.D. 70) (See 39 L.D. 162, 225).
Prescott, Henrietta P. (46 L.D. 486); overruled, 51 L.D. 287.
Pringle, Wesley (13 L.D. 519); overruled, 29 L.D. 599.
Provensal, Victor H. (30 L.D. 616); overruled, 35 L.D. 399.
Prue, Widow of Emanuel (6 L.D. 436); vacated, 33 L.D. 409.
Pugh, F. M. *et al.* (14 L.D. 274); in effect vacated, 232 U.S. 452.
Puyallup Allotment (20 L.D. 157); modified, 29 L.D. 628.

Ramsey, George L., Heirs of Edwin C. Philbrick (A–16060), August 6, 1931, unreported; recalled and vacated, 58 I.D. 272, 275, 290.
Rancho Alisal (1 L.D. 173); overruled, 5 L.D. 320.
Ranger Fuel Corporation, 2 IBMA 163 (July 17, 1973), 80 I.D. 708; Set aside by Memorandum Opinion and Order Upon Reconsideration in Ranger Fuel Corporation, 2 IBMA 186 (September 5, 1973), 80 I.D. 604.
Rankin, James D. *et al.* (7 L.D. 411); overruled, 35 L.D. 32.
Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404.

Rayburn, Ethel Cowgill, A–28866 (Sept. 6, 1962) is modified by T. T. Cowgill, *et al.*, 19 IBLA 274 (Apr. 7, 1975).

Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523.

*Reed *v.* Buffington (7 L.D. 154); overruled, 8 L.D. 110 (See 9 L.D. 360).

Regione *v.* Rosseler (40 L.D. 93); vacated, 40 L.D. 420.

Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355.

Reliable Coal Corp., 1 IBMA 50, 78 I.D. 199 (1971); distinguished, Zeigler Coal Corporation, 1 IBMA 71, 78 I.D. 362 (1971).

Rialto No. 2 Placer Mining Claim (34 L.D. 44); overruled, 37 L.D. 250.

Rico Town Site (1 L.D. 556); modified, 5 L.D. 256.

Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421.

Roberts *v.* Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174.

Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1.

Rogers *v.* Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165.

Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649.

Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321.

*Rogers *v.* Lukens (6 L.D. 111); overruled, 8 L.D. 110 (See 9 L.D. 360).

Romero *v.* Widow of Knox (48 L.D. 32); overruled so far as in conflict, 49 L.D. 244.

Roth, Gottlieb (50 L.D. 196); modified, 50 L.D. 197.

Rough Rider and Other Lode Claims (41 L.D. 242, 255); vacated, 42 L.D. 584.

St. Clair, Frank (52 L.D. 597); modified, 53 I.D. 194.

*St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354 (See 32 L.D. 21).

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Fogelberg (29 L.D. 291); vacated, 30 L.D. 191.

St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen (20 L.D. 249); overruled, 25 L.D. 86.

Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93.

Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88.

Santa Fe Pacific R.R. Co. *v.* Peterson (39 L.D. 442); overruled, 41 L.D. 383.

Satisfaction Extension Mill Site (14 L.D. 173) (See 32 L.D. 128).

*Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797 (See 37 L.D. 330).

Schweite, Helena M., 14 IBLA 305 (Feb. 1, 1974); Naughton, Harold J., 3 IBLA 237, 78 I.D. 300 (1971) is distinguished by Kristeen J. Burke, Joe N. Melovedoff, Victor Melovedoff, 20 IBLA 162 (May 5, 1975).

Schweitzer *v.* Hilliard *et al.* (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639.

Serrano *v.* Southern Pacific R.R. Co. (6 C.L.O. 93); overruled, 1 L.D. 380.

Serry, John J. (27 L.D. 330); overruled so far as in conflict, 59 I.D. 416, 422.

Shale Oil Company (See 55 I.D. 287).

Shanley *v.* Moran (1 L.D. 162); overruled, 15 L.D. 424.

Shillander, H. E., A–30279 (January 26, 1965), overruled, 79 I.D. 416 (1972).

Shineberger, Joseph (8 L.D. 231); overruled, 9 L.D. 202.

Silver Queen Lode (16 L.D. 186); overruled, 57 I.D. 63.

Simpson, Lawrence W. (35 L.D., 399, 609); modified, 36 L.D. 205.

Sipchen *v.* Ross (1 L.D. 634); modified, 4 L.D. 152.

Smead *v.* Southern Pacific R.R. Co. (21 L.D. 432); vacated, 29 L.D. 135.

Snook, Noah A. *et al.* (41 L.D. 428);

overruled so far as in conflict, 43 L.D. 364.

Sorli *v.* Berg (40 L.D. 259); overruled, 42 L.D. 557.

Southern Pacific R.R. Co. (15 L.D. 460); reversed, 18 L.D. 275.

Southern Pacific R.R. Co. (28 L.D. 281); recalled, 32 L.D. 51.

Southern Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528.

Southern Pacific R.R. Co *v.* Bruns (31 L.D. 272); vacated, 37 L.D. 243.

South Star Lode (17 L.D. 280); overruled, 20 L.D. 204; 48 L.D. 523.

Spaulding *v.* Northern Pacific R.R. Co. (21 L.D. 57); overruled, 31 L.D. 151.

Spencer, James (6 L.D. 217); modified, 6 L.D. 772; 8 L.D. 467.

Sprulli, Leila May (50 L.D. 549); overruled, 52 L.D. 339.

Standard Oil Company of California *et al.*, 76 I.D. 271 (1969), no longer followed, 5 IBLA 26, 79 I.D. 23 (1972).

Standard Oil Company of California *v.* Morton, 450 F. 2d 493 (9th Cir. 1971); 79 I.D. 23 (1972).

Standard Shales Products Co. (52 L.D. 522); overruled so far as in conflict, 53 I.D. 42.

Star Gold Mining Co. (47 L.D. 38); distinguished by U.S. *v.* Alaska Empire Gold Mining Co., 71 I.D. 273 (1964).

State of California (14 L.D. 253); vacated, 23 L.D. 230.

State of California (15 L.D. 10); overruled, 23 L.D. 423.

State of California (19 L.D. 585); vacated, 28 L.D. 57.

State of California (22 L.D. 428); overruled, 32 L.D. 34.

State of California (32 L.D. 346); vacated, 50 L.D. 628 (See 37 L.D. 499 and 46 L.D. 396).

State of California (44 L.D. 118); overruled, 48 L.D. 98.

State of California (44 L.D. 468); overruled, 48 L.D. 98.

State of California *v.* Moccettini (19 L.D. 359; overruled, 31 L.D. 335.

State of California *v.* Pierce (3 C.L.O. 118); modified, 2 L.D. 854.

State of California *v.* Smith (5 L.D. 543); overruled so far as in conflict, 18 L.D. 343.

State of Colorado (7 L.D. 490); overruled, 9 L.D. 408.

State of Florida (17 L.D. 355); reversed, 19 L.D. 76.

State of Florida (47 L.D. 92, 93); overruled so far as in conflict, 51 L.D. 291.

State of Louisiana (8 L.D. 126); modified, 9 L.D. 157.

State of Louisiana (24 L.D. 231); vacated, 26 L.D. 5.

State of Louisiana (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.

State of Louisiana (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.

State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358.

State of Nebraska *v.* Dorrington (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123.

State of New Mexico (46 L.D. 217); overruled, 48 L.D. 98.

State of New Mexico (49 L.D. 314); overruled, 54 I.D. 159.

State of Utah (45 L.D. 551); overruled, 48 L.D. 98.

*Stevenson, Heirs of *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).

Stewart *et al. v.* Rees *et al.* (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401.

Stirling, Lillie E. (39 L.D. 346); overruled, 46 L.D. 110.

Stockley, Thomas J. (44 L.D. 178, 180); vacated, 260 U.S. 532 (See 49 L.D. 460, 461, 492).

Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51.

Streit, Arnold (T–476 (Ir.)), Aug. 26, 1962, unreported; overruled, 62 I.D. 12.

Stricker, Lizzie (15 L.D. 74); overruled so far as in conflict, 18 L.D. 283.

Stump, Alfred M. *et al.* (39 L.D. 437); vacated, 42 L.D. 566.

Sumner *v.* Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173.

Superior Oil Company, A–28897 (September 12, 1962) and William Wostenberg, A–26450 (September 5, 1952), distinguished in dictum; 6 IBLA 318, 79 I.D. 439 (1972).

Sweeney *v.* Northern Pacific R.R. Co. (20 L.D. 394); overruled, 28 L.D. 174.

*Sweet, Eri P. (2 C.L.O. 18); overruled, 41 L.D. 129 (See 42 L.D. 313).

Sweeten *v.* Stevenson (2 B.L.P. 42); overruled so far as in conflict, 3 L.D. 248.

Taft *v.* Chapin (14 L.D. 593); overruled, 17 L.D. 414.

Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370.

Talkington's Heirs *v.* Hampfling (2 L.D. 46); overruled, 14 L.D. 200.

Tate, Sarah J. (10 L.D. 469); overruled, 21 L.D. 211.

Taylor, Josephine *et al.* (A–21994), June 27, 1939, unreported; overruled so far as in conflict, 59 I.D. 258, 260.

Taylor *v.* Yates *et al.* (8 L.D. 279); reversed, 10 L.D. 242.

*Teller, John C. (26 L.D. 484); overruled, 36 L.D. 36 (See 37 L.D. 715).

Thorstenson, Even (45 L.D. 96); overruled so far as in conflict, 47 L.D. 258.

Tieck *v.* McNeil (48 L.D. 158); modified, 49 L.D. 260.

Toles *v.* Northern Pacific Ry. Co. *et al.* (39 L.D. 371); overruled so far as in conflict, 45 L.D. 93.

Tonkins, H. H. (41 L.D. 516); overruled, 51 L.D. 27.

Traganza, Mertle C. (40 L.D. 300); overruled, 42 L.D. 612.

Traugh *v.* Ernst (2 L.D. 212); overruled, 3 L.D. 98.

Tripp *v.* Dumphy (28 L.D. 14); modified, 40 L.D. 128.

Tripp *v.* Stewart (7 C.L.O. 39); modified, 6 L.D. 795.

Tucker *v.* Florida Ry. & Nav. Co. (19 L.D. 414); overruled, 25 L.D. 233.

Tupper *v.* Schwarz (2 L.D. 623); overruled, 6 L.D. 624.

Turner *v.* Cartwright (17 L.D. 414); modified, 21 L.D. 40.

Turner *v.* Lang (1 C.L.O. 51); modified, 5 L.D. 256.

Tyler, Charles (26 L.D. 699); overruled, 35 L.D. 411.

Ulin *v.* Colby (24 L.D. 311); overruled, 35 L.D. 549.

Union Pacific R.R. Co. (33 L.D. 89); recalled, 33 L.D. 528.

United States *v.* Barngrover (On Rehearing), 57 I.D. 533 (1942), overruled in part by United States *v.* Robinson, Theresa B., 21 IBLA 363, 82 I.D. 414 (1975).

United States *v.* Bush (13 L.D. 529); overruled, 18 L.D. 441.

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NOTE.—The abbreviations used in this title refer to the following publications: "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C.L.L." to Copp's Public Land Laws edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C.L.O." to Copp's Land Owner, vols. 1–18; "L. and R." to records of the former Division of Lands and Railroads; "L.D." to the Land Decisions of the Department of the Interior, vols. 1–52; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

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MISCELLANEOUS REGULATIONS

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

DECISIONS OF THE DEPARTMENT OF THE INTERIOR

CLARK COUNTY SCHOOL DISTRICT

18 IBLA 289

Decided *January 6, 1975*

Appeal from decision of the Nevada State Office, Bureau of Land Management, declaring divestiture of title to lands granted under the Recreation and Public Purposes Act (Nev. 043486).

Affirmed.

1. Patents of Public Lands: Generally—Public Lands: Disposals of: Generally—Recreation and Public Purposes Act

The Recreation and Public Purposes Act, and the pertinent regulations thereunder, require that a grantee of land under the Act must develop the land in accordance with the specified uses proposed in the patent application within a reasonable time following the date of issuance of patent.

2. Patents of Public Lands: Generally—Public Lands: Disposals of: Generally—Recreation and Public Purposes Act

Failure over a seventeen-year period to develop land patented under the Recreation and Public Purposes Act in accordance with the specified public uses proposed in the patent application and set out in the patent is a violation of the condition in the patent which provides that if the lands are devoted to a use other than that for which they were conveyed title shall revert to the United States.

APPEARANCES: Thurman White, Associate Superintendent, School Facilities Division, Clark County School District, for appellant; David S. Mercer, Esq., Office of the Solicitor, Department of the Interior, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

INTERIOR BOARD OF LAND APPEALS

Clark County School District has appealed from a decision of the Nevada State Office, Bureau of Land Management (hereafter BLM), dated July 25, 1973, which held that appellant's failure over a seventeen-year period to develop any of the uses specified in a patent to land granted under the Recreation and Public Purposes Act, 43 U.S.C. § 869 (1954), was a violation of the reversionary provision of the patent which effected a divestiture of the School District's title to the land and the revestiture thereof in the United States.

The history of this case goes back a number of years. On January 3, 1956, in accordance with the requirements of the Recreation and

Public Purposes Act, the Las Vegas Union School District (predecessor to appellant Clark County School District) filed application Nevada 043486 for approximately 337 acres of land in the vicinity of Las Vegas. In its application, the School District stated that it wanted the lands for:

> Public schools, high schools, university or educational sites, school administrative sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities.

No target date was given for the construction of the proposed facilities.

Thereafter, pursuant to the provisions of the Act, the United States, on July 26, 1956, issued Patent No. 1162525 to the School District for 196.72 acres of land. The five-acre tract in dispute in this appeal, lot 48, sec. 23, S½ NE¼ SE¼ NE¼, T. 21 S., R. 61 E., Mount Diablo Meridian, Nevada, was included among the patented lands. With respect to the 140 acres remaining unpatented, application Nevada 043486 was suspended pending the clearance of mining conflicts from the land.

At the time of the grant, the Act provided that:

> * * * If at any time after the lands are conveyed by the Government, the grantee or its successor attempts to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary, title to the lands shall revert to the United States.

43 U.S.C. § 869–2 (1954).

The section further provided that the above provision would cease to be in effect 25 years after the issuance of the patent. The pertinent regulation thereunder provided that:

> All patents under this act will contain a clause providing that if the patentee or its successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without consent of competent authority, title shall revert to the United States. This clause will terminate 25 years after issuance of the patent. * * *

43 CFR 254.10(c) (1954).[1]

In accordance with the above requirements of the Act and regulation, the patent under which the School District took title to the land in question included a clause which provided that:

> If the patentee or successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than public schools, high schools, university or educational sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities without consent of competent authority, title shall revert to the United States.

This restriction terminates on July 26, 1981, 25 years after issuance of the patent.

On February 15, 1961, appellant submitted an additional application, Nevada 056834, for scattered school sites in the Las Vegas area. The School District also indicated its continued interest in acquiring the

[1] The present regulation, with some modification, is to the same effect. *See* 43 CFR 2741.8 (1973).

remaining tracts in application Nevada 043486. Both applications were processed together.

By letter dated January 13, 1967, the BLM informed appellant that some of the lands pending in Nevada application 043486 had become available for disposal to the School District. The BLM advised appellant that a lease only would be authorized if construction was not scheduled to begin within 18 months after issuance of the patent. Appellant responded by letter dated January 17, 1967, requesting that a lease be prepared for the available land.

On January 31, 1967, the BLM conducted a land report compliance check on appellant's land to determine if sites patented under the Recreation and Public Purposes Act were being improved, used, and maintained consistent with the public purposes for which they were conveyed. The report indicated that out of 51 lots included within Patent No. 1162525, only four had been developed. Lot 48 was among the 47 lots that were still vacant.

Following this compliance check, the BLM wrote a letter to appellant, dated February 13, 1967, which read in pertinent part as follows:

> By the filing of * * * application, Nevada 043486, in January, 1956, * * * Clark County School District represented to the Bureau that construction of schools and related facilities were definitely proposed projects. Regulations then and now in effect prohibit conveyance by patent absent a showing that development and use of the land are imminent.
>
> We therefore request that you advise us of your present plans for use of the undeveloped land described above, if any, or show cause why title to the [land] should not revert to the United States.

In a reply, dated March 8, 1967, appellant responded as follows:

> The lands are still intended for the definitely proposed projects described in the original application and there still exists the probability that each of the projects will be fully implemented within a reasonable time. As you know the rate of growth in population in Clark County has not proceeded at a uniformly fast rate. In fact, we are now at a low ebb of increase but see definite signs of a new spurt of growth in the near future.

The BLM, at that point, took no further action with respect to the lands listed in appellant's patent.

Sometime in 1971, a representative from St. Viator Community Center, Las Vegas, Nevada, approached appellant with an offer to buy or lease lot 48. Appellant did not want to relinquish title to the land in favor of the Center, but the School District was amenable to a leasing arrangement. However, upon inquiry to the BLM, appellant was informed that a lease to the Center would not be in keeping with the Recreation and Public Purposes Act as the School District would no longer have effective control over the land. Negotiations between the parties then ceased.

Thereafter, on December 20, 1972, the Roman Catholic Bishop of Reno, Nevada, applied for the subject site under the Recreation and Public Purposes Act for the purpose of expanding the St. Viator Community Center which is contiguous to lot 48. In a letter accompanying

its application, the following is stated:

> The School Board has not made any attempt to develop the land since patent was issued. Discussions with the school district indicate they have no intention of any development. Rather they wish to sell the property for revenue purposes.

On January 30, 1973, another land report compliance check was conducted by the BLM on the subject property to determine the extent of use by appellant for school site purposes. The report stated the following:

> [A]pplicant has made no attempt to develop this parcel [sec. 23, lot 48] for the intended educational facilities as stipulated in patent grant on July 20, 1956.[2] The land remains undeveloped (see photos) with no past attempts to construct any type of public school improvements. Telephone conversation with Mr. Deveney, School District Realty Agent, on January 30, 1973, revealed that the District had no plans for development of subject parcel.

Based on this report, the Bureau requested that the School District voluntarily reconvey the land to the United States. The School District refused.

Thereafter, the Bureau made one final plea to the School District regarding voluntary reconveyance. In a letter from the Bureau to appellant, dated March 14, 1973, the following is stated:

> You will recall our discussions about the parcel of land on Eastern Avenue patented to the School District, along with other lands, in 1956. You indicated that the District would not voluntarily reconvey the land even though there are no present plans to develop the site for school purposes.
>
> We have before us now an application from the Roman Catholic Bishop of Reno for the site. The application is properly supported by development and management plans which demonstrate a need for and capability to use the land for purposes contemplated by the Recreation and Public Purposes law.
>
> In view of the School District's long continuing failure to develop and use the site and the apparently bona fide competing demand for it, I request that the Board reconsider its position in the matter and reconvey the parcel.
>
> [Y]ou inquired about the possibility of the District leasing the land to the Church and retaining title. I believe such an arrangement would be inconsistent with the law and that we could not approve it.

In a letter dated May 2, 1973, appellant, through its Associate Superintendent, responded as follows:

> I am sympathetic to the needs of the Roman Catholic Bishop of Reno for the parcel. Indeed this office has attempted to find some way of making the property available to the church while safeguarding the District's rights to future use of the property.
>
> Availability of public lands in the fast growing Paradise Valley is very scarce. Private land when available is expensive and is becoming much harder to obtain. The property in question has a real potential of utilization by the District as an annex to the present Education Center, a short distance away on Flamingo Road.
>
> The administration cannot recommend to the Board of School Trustees that the site be reconveyed to the federal government. This decision, of course, may be appealed directly to the Board of School Trustees.

Following this train of events, the Nevada State Office, BLM, in its decision dated July 25, 1973, deter-

[2] The correct date is July 26, 1956.

mined that the Recreation and Public Purposes Act, and the pertinent regulations thereunder, required that a grantee of land under the Act must actually put the land to the specified uses proposed within a reasonable time from the date of the issuance of patent. As noted above, the State Office concluded that appellant's failure to develop the patented land for over 17 years was an unreasonable length of time for nondevelopment and violated the reversionary provision of the patent which required that the land could not be devoted to a use other than that for which the lands were conveyed. Accordingly, the State Office held that this extended nonuse effected a divestiture of the School District's title to the land and the revestiture thereof in the United States.

On appeal, Clark County School District generally presents three arguments:

(1) The State Office decision holding that the reversionary clause in appellant's patent was activated and divestiture occurred due to nondevelopment of the subject property during the 17-year period was based on an unreasonable and narrow construction of the law governing compliance with the terms of the Recreation and Public Purposes Act.

(2) The Bureau of Land Management has acted in a discriminatory fashion as it has not attempted to apply similar compliance criteria to undeveloped lands acquired under the Recreation and Public Purposes Act and held by other public agencies.

(3) The Bureau of Land Management, Nevada State Office Manual, page 2, Appendix 2, January 21, 1970, provides that even assuming less than satisfactory compliance with the Act,

> a—the recipient is "allowed to prepare and submit a new plan of development in accordance with 43 CFR 2232.1-2." [3]
> or
> b—the recipient is "allowed to pay the amount equal to the difference between the price paid for the land and 50% of the fair market value of the land as of the date of patent plus compound interest computed at 4%." [4]

Appellant requests that the Department give it either of the two above options rather than declaring divestiture of its title to the subject land.

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[3] The School District's County Board of Trustees held a meeting on August 23, 1973, wherein they approved a project for the subject site. Appellant has submitted a new application offered as an amendment to its original application in which it proposes to use the site for educational television facilities. Construction would begin in 1978 *if* a general obligation bond to be submitted to the electorate of Clark County, sometime in 1974, were approved. It is questionable whether this proposal with its 1978 construction date and speculative financing meets the requirements of a "definitely proposed project" as specified in the Act.

[4] Regardless of the instructions in the Office Manual, the law does not provide for a sale on the terms requested by the School District. The Recreation and Public Purposes Act provides that sales "shall be made at a price to be fixed by the Secretary of the Interior through appraisal or otherwise, after taking into consideration the purpose for which the lands are to be used." 43 U.S.C. § 869–1(a) (1970). 43 CFR 2741.7(c) (1973), provides that sales "will be made at prices fixed through appraisal of the fair market value of the lands or otherwise, taking into consideration the purpose for which the land will be used."

In its first argument on appeal, the School District justifies its nondevelopment of the subject land for over seventeen years on the basis that neither the original application nor the patent for the land specified a timetable for development. In the absence of such a specific demand from the Department, appellant argues that it is unreasonable at this point to construe the law so as to decide that the School District has failed to comply with the provisions of the patent. We are not persuaded by this argument.

The Recreation and Public Purposes Act, the regulations thereunder, and the legislative history of the Act, all indicate that Congress intended that any land granted under the Act must be used for the specifically proposed public project listed in the patent within a reasonable time from the date of issuance of the patent. When the land was conveyed, the Act provided that land disposed of was "to be used for an established or definitely proposed project." 43 U.S.C. § 869(a) (1954).[5] In discussing this requirement, the House Committee on Interior and Insular Affairs, in House Report No. 353, May 7, 1953 (H.R. 1815), stated the following:

> [I]f disposition of lands is to be made for other than recreational purposes, the Secretary of the Interior must have proof that the land will be used for an established or definitely proposed project.

When H.R. 1815 passed the House and was before the Senate Committee on Interior and Insular Affairs, the Department of the Interior submitted a report on the bill as amended by the House. The Department interpreted the "established or definitely proposed project" requirement as follows:

> [P]ublic lands should not be disposed of to a local Government agency if such agency has only vague plans for possible utilization of the lands some time in the indefinite future. * * * Under this language ["an established or definitely proposed project"] this Department could require the proposed beneficiary to show that it has taken such action as may be practical to secure needed local authorization for the project, to make definite plans for the type of facilities to be developed, and to make adequate funds available before title to the lands is actually transferred.[6]

Regulation 43 CFR 254.5(b) (1954) was adopted shortly after enactment of the 1954 Act. It clearly shows the contemporaneous administrative interpretation of the Act:

> Applicants will not be granted title to or use of land under the act except for an established or definitely proposed project. A definitely proposed project is a project which has been authorized by competent authority irrespective of whether or not it has been financed and otherwise fully implemented, providing that there exists the probability that it will be fully implemented within a reasonable time.

Particular attention should be directed to the proviso requiring that there exist "the probability that it will be fully implemented within a reasonable time."

[5] 43 U.S.C. § 869(a) (1970) is to the same effect.

[6] The report was dated March 5, 1954, from Orme Lewis, Acting Assistant Secretary of the Interior, to the Hon. Hugh Butler, Chairman of the Senate Committee on Interior and Insular Affairs.

[1] The facts in this case indicate that the BLM was initially satisfied that the requirements for a "definitely proposed project" were met by the School District's general representation that construction of the enumerated educational facilities listed in appellant's application was to take place on the patented land. The requirement that appellant follow through with its plan to develop a definitely proposed project for use on the land did not expire, however, upon the filing of its application or upon the grant of the patent. The grant to the School District was conditioned upon its representation to devote the land to public use.

The law generally requires that a condition be performed within a reasonable time when there is no express deadline in the conveyance. *See Adams* v. *Ore Knob Copper Co.*, 7 F. 634, 638 (C.C.N.C. 1880); *Union Stockyards Co.* v. *Nashville Packing Co.*, 140 F. 701, 706 (6th Cir. 1905); 4 THOMPSON, REAL PROPERTY, *Estates* § 1889 (1961); 26 C.J.S. *Deeds*, § 152 (1955). This interpretation is further buttressed in this instance by 43 CFR 254.5(b) (1954) which required that a definitely proposed project be fully implemented within a reasonable time. Accordingly, we find that there was a continuing obligation to develop the land for the stated public purpose within a reasonable time following the date of issuance of patent.

Appellant became aware of its continuing obligation to develop the land as early as March 14, 1962, when it was informed by a letter decision of the Department that specific construction timetables would thereafter be required to assure the Department that appellant was in fact planning to go ahead with the proposed educational improvements. In January of 1967, appellant was informed that lands pending in Nevada application 043486 could be issued by lease only, if construction was not scheduled to begin within 18 months after issuance of patent. Finally, following the compliance check in 1967, appellant was again informed by the BLM of the requirement that appellant move forward with the construction of its definitely proposed school and related facilities projects.

We assume that appellant dealt with the Government in good faith, which includes the intention to observe legal duties. *See Kiyoichi Fujikawa* v. *Sunrise Soda Water Works Co.*, 158 F.2d 490, 494 (9th Cir. 1946). In its letter response of March 8, 1967, the School District acknowledged its continuing obligation to comply with the requirements of the Act and stated that it intended to comply as there still existed the probability that the "definitely proposed projects described in the original application [would be] fully implemented within a reasonable time." No development, however, was forthcoming.

Appellant was required to begin construction on its proposed educational projects within a reasonable

time following issuance of patent. For over a seventeen-year period there has been no development of any kind on the land involved in this appeal. We find in this instance that appellant, by not developing the land for a seventeen-year period following issuance of its patent, has failed to meet its continuing obligation to develop a definitely proposed project within a reasonable time.

[2] We further find that nonuse of land over an unreasonable period of time after issuance of patent violates the provision of the Act requiring that patented lands not be devoted to a use other than that for which the lands were conveyed. *Cf. Robert Ward Morgan*, A–26499 (December 10, 1952) at 2. This conclusion is supported by the additional requirement of the Act and regulations that patents only issue for definitely proposed projects. Such projects were defined as those to be completed within a reasonable time. Nonuse of land, which was originally awarded with the intent that it be devoted to public purposes, does not further the public policy of the Act. To hold otherwise would permit the absurd result of allowing a grantee under patent to hold the land idle for the 25-year reverter period, at the end of which time unrestricted title would be received for land which was never put to use for the public purposes originally intended in the grant.

Thus, the Board concludes that appellant's failure to develop the land for educational use within a reasonable time following issuance of patent is a basis for finding that there had been a violation of the patent's reversionary provision. This construction is in conformity with general law, with the spirit of the Act, and permits the Department, on a continuing basis, to administer the Act to assure that public lands granted thereunder will be devoted to definitely proposed projects within a reasonable time following issuance of patent.[7]

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[7] Reference may be made to other acts in *pari materia* to determine a course or trend of legislation from which a Congressional policy may be identified. Thus, we note that prior to repeal in 1970, the Act of May 13, 1946, 60 Stat. 179, *amending* the Federal Airport Act, provided in pertinent part that,

"* * * each such conveyance shall be made on the condition that the property interest conveyed shall automatically revert to the United States in the event that the lands in question are *not* developed, or cease to be used, for airport purposes." (Italics added.) This policy was continued in the Airport and Airway Development Act of 1970, 49 U.S.C. § 1723(b), which requires in part that,

* * * "[a] conveyance may be made only on the condition that, at the option of the Secretary, the property interest conveyed shall revert to the United States in the event that the lands in question are *not developed* for airport purposes or used in a manner consistent with the terms of the conveyance." * * * (Italics added.)

In *United States* v. *Sequoia Union High School District*, 145 F. Supp. 177 (N.D. Cal. 1956), the court was dealing with an issue arising under the Surplus Property Act of 1944, *as amended*, 50 U.S.C. § 1622 (1970). In 1948, the United States had conveyed land to the School District pursuant to the Act, and the conveyance contained the following condition:

"[F]or a period of ten (10) years from the date of this conveyance said premises shall be continuously used as and for school purposes and for incidental purposes pertaining thereto, but for no other purposes."

For approximately five years following the grant, the School District made no use whatsoever of the property except to clear weeds therefrom. Based on this nonuse, the court concluded that the premises were not used

With respect to appellant's second and third arguments on appeal we find them both without merit. The decision of the BLM to declare a divestiture of appellant's title to the land is in no way discriminatory. *See United States* v. *Howard*, 15 IBLA 139, 144–46 (1974); *United States* v. *Zuber*, 13 IBLA 193, 197–98 (1973); *United States* v. *Gunn*, 7 IBLA 237, 245, 79 I.D. 588, 591 (1972). As for the BLM Official Manual (Appendix) cited by appellant, this is simply an in-house instruction procedure for quinquennial compliance checks on Recreation and Public Purposes Act patents and leases. The instructions do not have the force or effect of law. In any case, appellant failed to fully cite the manual instructions which provide that following a determination that the patentee has not complied with the terms of the grant, the Office should "allow 60 days for patentee to show cause why title to the land should not revert to the United States *or request in lieu of forfeiture of title*" an alternate plan or a purchase agreement. (Italics added.) The manual does not cite any statute or regulation authorizing a sale of land. However, even assuming authority for such a sale exists, we note that the manual makes its exercise discretionary. In this instance, the Bureau properly chose forfeiture in light of appellant's continued inaction.[8]

We conclude that appellant's failure to comply with the requirements of the patent divested it of title and revested the title in the United States. Accordingly, the BLM was correct in informing appellant that a violation of the reversionary provision in the patent had occurred. The case is returned to the Bureau of Land Management to undertake appropriate action to remove the cloud on the United States' title.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

MARTIN RITVO,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

JOAN B. THOMPSON,
Administrative Judge.

DOUGLAS E. HENRIQUES,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

for school purposes as required by the statutory condition imposed in the deed. The court then held that forfeiture was effected by breach of this condition.

[8] While we recognize that the St. Viator Community Center has an interest in obtaining the tract, we point out that at the time it filed its application the land applied for was noted on the land office records as patented land. Until such time as the land office records are properly noted, the land is not open to the filing of applications. Accordingly, St. Viator Community Center's application must be rejected. *William J. Colman*, 3 IBLA 322 (1971).

ADMINISTRATIVE JUDGE FISHMAN DISSENTING:

The main opinion holds that appellant's failure, over a 17-year period, to develop the patented land for any of the uses specified in the patent, constitutes a breach of the grant and revests title in the United States.

At the time of the grant, the Recreation and Public Purposes Act, 43 U.S.C. § 869–2 (1954) provided that:

> * * * If at any time after the lands are conveyed by the Government, the grantee or its successor attempts to transfer title to or control over these lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without the consent of the Secretary, title to the lands shall revert to the United States.

The section further provided that the above provision would cease to be in effect 25 years after the issuance of patent. The pertinent regulation under 43 U.S.C. § 869–2 (1954) provided that:

> All patents under this act will contain a clause providing that if the patentee or its successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than that for which the lands were conveyed, without consent of competent authority, title shall revert to the United States. This clause will terminate 25 years after issuance of the patent. * * *

43 CFR 254.10(c) (1954).

In accordance with the above requirements of the Act and regulation, Patent No. 1162525, issued July 26, 1956, under which the School District took title to the land in question, the patent included a clause which provided that:

> If the patentee or successor attempts to transfer title to or control over the lands to another or the lands are devoted to a use other than public schools, high schools, university or educational sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities without consent of competent authority, title shall revert to the United States.

This restriction terminates on July 26, 1981, 25 years after issuance of the patent.

In its application for the land, Clark County School District stated it wanted the lands for:

> Public schools, high schools, university or educational sites, school administrative sites, parks, playgrounds, athletic fields, auditoriums and other public school educational needs and facilities.

The District admittedly has used the land for none of these purposes; in fact, it has made no use of the land. Thus the primary issue to be resolved is whether nonuse of the land constitutes a breach of the terms of the instrument of conveyance, or of the statute and regulations under which it was issued.

It is obvious that the plain words of the statute do not authorize a termination of a patent for nonuse. Such a result can only be raised by conjecture.

> It is generally safe to reject an interpretation that does not naturally suggest itself to the mind of a casual reader * * *.

Shulthis v. *MacDougal*, 162 F. 331, 340 (E. D. Okla. 1907), *quoting*

from Ardmore Coal Co. v. *Bevil*, 61 F. 757, 759 (8th Cir. 1894).

The rule that intent governs the meaning of a statute really means the intent as expressed in the statute. *United States* v. *Goldenberg*, 168 U.S. 95, 102–103 (1897). There is nothing in the governing statute, regulation, or instrument of conveyance to compel the conclusion that nonuse is a violation of the grant.

The main opinion's resort to the legislative history of the Recreation and Public Purposes Act, to supply what the majority seems to believe was inadvertently omitted, is not well founded. As is indicated below, such resort is appropriate only where the meaning of a statute is doubtful.

This principle is illuminated in *United States* v. *Shreveport Grain & Elevator Co.*, 287 U.S. 77, 83–84 (1932), as follows:

> Our attention is called to the fact that the House Committee on Interstate and Foreign Commerce, in reporting the bill which afterwards became the act in question (H.R. 850, 62d Cong., 2d Sess., pp. 2–4), agreed with the view that the authority to make rules and regulations was confined to the establishment of tolerances and exemptions; and that the Senate Committee on Manufactures (S.R. 1216, 62d Cong., 3d Sess., pp. 2–4) reported to the same effect. In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to the natural import of its terms. *Wisconsin R. R. Commn.* v. *C., B. & Q. R. Co.*, 257 U.S. 563, 588–589; *Penna. R. Co.* v. *International Coal Co.*, 230 U.S. 184, 199; *Van Camp & Sons* v. *American Can Co.*, 278 U.S. 245, 253. Like other extrinsic aids to construction their use is "to *solve*, but not to *create* an ambiguity." *Hamilton* v. *Rathbone*, 175 U.S. 414, 421. Or, as stated in *United States* v. *Hartwell*, 6 Wall. 385, 396, "If the language be clear it is conclusive. There can be no construction where there is nothing to construe." The same rule is recognized by the English courts. In *King* v. *Commissioners*, 5 A. & E. 804, 816, Lord Denman, applying the rule, said that the court was constrained to give the words of a private act then under consideration an effect which probably was "never contemplated by those who obtained the act, and very probably not intended by the legislature which enacted it. But our duty is to look to the language employed, and construe it in its natural and obvious sense." See also *United States* v. *Lexington Mill Co.*, 232 U.S. 399, 409; *Caminetti* v. *United States*, 242 U.S. 470, 485.

Even if the legislative history of H.R. 1815 were to be considered, there is nothing in the history cited by the majority which shows that the unexpressed condition subsequent was intended.

It is noteworthy that the governing regulation, 43 CFR 254.10(d) (1954), *now* substantially embodied in 43 CFR 2741.8, does not address itself to the nonuse situation at all. Obviously the Department could have adopted a regulation which would make nonuse a violation of the grant. It failed to do so. Whether such a regulation would be efficacious as a matter of law is not passed upon.

This Board has held that a regulation should be so clear that there is no basis for an oil and gas lease applicant's noncompliance with

them before they are deprived of a statutory preference right to a lease. *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971); *Georgette B. Lee*, 3 IBLA 272 (1971). *A fortiori*, a fee holder of land should not be deprived of his title where his violation of a regulatory condition subsequent can only be raised by conjecture.

The statute clearly provides that the title shall revert in the event of either of *two* contingencies, *i.e.* (1) transfer of the land to another or (2) devotion of the land to an unauthorized use, both of which require affirmative, overt action by the grantee. The majority perceives that the Congress, in enacting this legislation, actually intended to include a third contingency which would trigger a reverter, to wit: nonuse, a passive circumstance which requires no action by the grantee. Apparently the majority believes that Congress somehow failed to express this intention and the majority now undertakes to correct this legislative oversight by adding the third contingency by administrative fiat.

Certain hornbook principles apply to the case at bar. It is only when the meaning of a deed is uncertain that resort may be had to well-settled, but subordinate rules of construction, to be treated as such, and not as rules of positive law. In the interpretation of a deed, the unexpressed intent is unavailing. Restrictions as to use in a deed will not be extended by implication to include anything not clearly expressed, and doubts must be resolved in favor of the free use of land. *Latchis* v. *John*, 117 Vt. 110, 85 A. 2d 575, 32 A.L.R. 2d 1203 (1952).

In *Pickle* v. *McKissick*, 21 Pa. 232 (1853), it was held that real estate conveyed to trustees for a schoolhouse and place of religious meetings, with a condition that if used for any other purpose it shall revert to the grantor and his heirs, it is not forfeited by mere nonuser.

In *Dade County* v. *North Miami Beach*, 69 So. 2d 780 (Fla. 1953), the court held that restrictions in a deed (as to use of land for park purposes) are not favored in law if they have the effect of destroying an estate and they will be construed strictly and will most strongly be construed against the grantor.

In *Buck* v. *City of Macon*, 85 Miss. 580, 37 So. 460 (1904), it was held that even if the words in a deed of a lot to the trustees of a township "for the use of a school and no other use" constitute a condition subsequent, breach of which works a forfeiture, such forfeiture is not worked by mere nonuser. The above decisions are illustrative of a firmly established principle of law.[1] We have found no impelling authority to the contrary.

The language of the patent in the case at bar is clearly distinguishable from that employed to establish a reversion in the event of nonuse.

For example, a patent, No. 1228-506, issued September 4, 1962, to the State of Alaska, under sec. 16 of the Federal Airport Act, 49 U.S.C.

[1] See cases cited in 26 C.J.S. *Deeds* § 154(b) (1956).

§ 1723 (1970), *formerly*, 49 U.S.C. § 1115, recited in part:

> * * * The property interest hereby conveyed shall automatically revert to the United States pursuant to section 16 of the Federal Airport Act, in the event that the lands in question *are not developed*, or cease to be used, for public airport purposes; and a determination by the Administrator of the Federal Aviation Agency, or his successor in function, that the lands *have not been developed*, or have ceased to be used for public airport purposes shall be conclusive of such fact. (Italics supplied.)

This language follows closely that of section 16 of the Federal Airport Act. It clearly shows that Congress, and the Department, used apt language to demonstrate that nonuse or nondevelopment was a sufficient basis to seek the termination of the estate.

Even though the airport patent provides that the "property shall automatically revert" on the breach of the condition and that the "determination of the Administrator * * *" that the condition has been breached "shall be conclusive of such fact," the Federal Aviation Administration has always resorted to court suit to cancel such a patent for breach of condition.

The main opinion, in my judgment, suffers from the vice which the F.A.A. procedure avoids. The majority states:

> We conclude that appellant's failure to comply with the requirements of the patent divested it of title and revested the title in the United States.

It is almost axiomatic that the Department has no authority to cancel administratively a patent. 4 *Op. Att'y Gen.* 120 (1842). Even where a patent issues without authority of law, suit must be maintained to cancel it in a court of competent jurisdiction. *United States* v. *Stone*, 69 U.S. (2 Wall.) 525 (1865). *United States* v. *Minor*, 114 U.S. 233 (1885), points out that even where fraud is involved, court suit is necessary. *See also Moffat* v. *United States*, 112 U.S. 24 (1884). A patent to public land cannot be annulled for fraud, unless the evidence is unequivocal, clear, and convincing. *United States* v. *Anderson*, 238 F. 648 (D. Mont. 1917). Once a patent to public lands has been issued the authority and jurisdiction of the Department of the Interior over such lands ceases and any subsequent claim of the United States to title therein must be determined by the courts. *United States* v. *McKenzie County*, 187 F. Supp. 470 (D.N.D. 1960), *aff'd* 291 F.2d 161 (1961). *See also Oregon Ry. & Nav. Co.* v. *Hertzberg*, 26 Or. 216, 37 P. 1019 (1894); *Johnson* v. *Pacific Coast S. S. Co.*, 2 Alaska 224 (1904), 13 *Op. Att'y Gen.* 457; *Kirwan Murphy*, 83 F. 275 (8th Cir. 1897), *appeal dismissed*, 170 U.S. 205 (1897); *United States* v. *White*, 17 F. 561 (C.C.D. Cal. 1883), *appeal dismissed*, 122 U.S. 647 (1887).

The Department has held consistently over many years that it has no further jurisdiction over land which has been patented. *Dorothy H. Marsh*, 9 IBLA 113 (1973); *Clarence March*, 3 IBLA 261 (1971); *Unruh* v. *Stearns*, A-30441

(October 27, 1965); *Pollyanna Rice*, A–30386 (May 12, 1965). Even where a patent has been issued by mistake and inadvertence, it vests title in the patentee and it may be canceled, if at all, by court suit within time limitations. *Sylvan A. Hart*, A–30832 (December 1, 1967).[2]

In an opinion, dated July 25, 1968, the Associate Solicitor, Division of Public Lands, concerning Exchange NM 0557441, advised the Director, Bureau of Land Management as follows:

> In 1965 and 1966, we understand, 54,546 acres of Federal lands were conveyed to Mr. Crowder in exchange for 37,544 acres. Although proper publication procedures were followed, it was only after the issuance of patent that mining claimants appeared and brought their claims to the conveyed lands to Federal attention. Consequently we now have a situation where one party (or his successors) holds a Federal patent to the same lands in which other parties claim rights under the mining law. The Forest Service wishes to know whether we intend to take any action on this matter.
>
> On the basis of what has so far come to our attention, we believe that the United States should no nothing. *Once a patent has been issued, the Department has lost all jurisdiction over the patented land and all that it can do is recommend that a judicial action be commenced for the annulment of the patent.* (Italics supplied.)

In sum, I believe that nonuse under the Recreation and Public Purposes Act conveyance here at bar is not a violation of the Act, the regulations, or of the terms of the conveyance. Even assuming, *arguendo*, that nonuse were such a violation, the Department is without authority to declare that the patentee has been divested of title and that title has been revested in the United States.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

JOSEPH W. GOSS,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

AUTHORITY TO DETERMINE ELIGIBILITY OF NATIVE VILLAGES AFTER JUNE 18, 1974

Statutory Construction: Generally

Although there may be no general rule for distinguishing between mandatory and directory provisions, a statute should be construed according to its subject matter and the purpose for which it was enacted, and the intention of the legislature should be controlling.

Statutory Construction: Generally—Statutory Construction: Legislative History

[2] Judge Stuebing, however, is of the opinion that the reverter may be self-executing upon the occurrence of the expressed contingency, and that the purpose of the subsequent litigation in that event would be to obtain a judicial declaration that the reverter has operated to revest the title in the grantee, so that record will correctly reflect the state of the title. *See, e.g., Board et ux.* v. *Nevada School Dist.*, 251 S.W. 2d 20 (Sup. Ct. Mo. 1952); *cf. Smith* v. *School Dist. No. 6 of Jefferson County*, 250 S.W. 2d 795 (Sup. Ct. Mo. 1952). The clause in the patent would appear to create fee simple determinable estate in the grantee, rather than a fee simple defeasible estate. For distinction, see Introductory Note to Chapter 4, 1 *RESTATEMENT OF THE LAW OF PROPERTY* (1944).

To deny status as an eligible village to persons in fact entitled to that status would be an unjust and unfair denial of a right specifically granted by Congress, as evidenced in the legislative history.

Statutory Construction: Administrative Construction

The two and one-half year time limitation set forth by Congress in section 11 (b) (2) of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610(b) (2), for the determinations of village eligibility, is an estimate of time reasonable enough to accomplish the basic purposes of that section of the Act.

M-36877

January 7, 1975

OPINION BY SOLICITOR FRIZZELL

OFFICE OF THE SOLICITOR

To: SOLICITOR.

SUBJECT: AUTHORITY TO DETERMINE ELIGIBILITY OF NATIVE VILLAGES AFTER JUNE 18, 1974.

On May 29, 1974, Solicitor's Opinion, M-36876, dealing with the above-entitled subject matter, was issued. The opinion discusses certain provisions of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624, other than those directly pertaining to village eligibility. Although these other provisions are analogous to the subject at hand, analysis of such provisions is better left to such time as it may be necessary to deal with them individually. Therefore, this revision of M-36876 does not include some of the discussion construing other provisions of the Act. This opinion is confined to the question of whether the Secretary can make determinations of village eligibility for benefits under the Alaska Native Claims Settlement Act, as to listed or unlisted villages after June 18, 1974.

Subsection 11(b) (2) of the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624 (Supp. II, 1972) (85 Stat. 696), provides:

> Within two and one-half years from the date of enactment of this Act, the Secretary shall review all of the villages listed in subsection (b) (1) hereof, and a village shall not be eligible for land benefits under subsections 14 (a) and (b), and any withdrawal for such village shall expire, if the Secretary determines that—
>
> * * * * *

Subsection 11(b) (3) provides:

> Native villages not listed in subsection (b) (1) hereof shall be eligible for land and benefits under this Act and lands shall be withdrawn pursuant to this section if the Secretary within two and one-half years from the date of enactment of this Act, determines that—* * *

The language contained in these two subsections dealing with determinations by the Secretary of the eligibility of both listed and unlisted villages does not indicate whether the two and one-half year time provision is mandatory or directory.

Before any conclusions can be drawn as to whether or not the provision is mandatory or directory, it is necessary to distinguish between the action which the Secretary is directed to complete under subsections 11(b) (2) and (3) and the

time period during which he must complete such action. There can be little argument that the Secretary must complete a review of all the listed villages, and that such a review is mandatory and essential to the purposes of the legislation. Furthermore, the Secretary is directed to make determinations of the eligibility of both listed and unlisted villages. The question at hand, however, is whether or not June 18, 1974, is in fact a "deadline" after which the Secretary can make no further determinations of village eligibility.

The legislative history makes it clear that it was the intent of Congress "to see that all villages—whether listed in the Act or not—which meet the requirements are granted lands under this Act." Senate Report No. 92-405, pages 138-9. Congress intended that *all* villages eligible for benefits should be granted these benefits and specifically insures their protection before final determination by means of the withdrawal procedures. At the same time, however, Congress intended that only those villages which meet the requirements of subsections 11 (b) (2) and (3) can receive these benefits and insured that result by requiring the Secretary to make a final determination of the eligibility of each listed and unlisted village before the benefits may be conferred upon these villages.

There is no universal rule by which directory provisions may, under all circumstances, be distinguished from those which are mandatory. 1A C.D. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 25.0 (4th ed. 1974). If the legislature considers the provisions sufficiently important that exact compliance is necessary then the provision is mandatory. But if the statute is merely a guide for the conduct of business and for orderly procedure, rather than a limitation of power, the provision will be construed as directory only. *French* v. *Edwards*, 80 U.S. (13 Wall.) 506 (1871); *John C. Winston Co.* v. *Vaughan*, 11 F. Supp. 954 (W.D. Okla. 1935), *affirmed*, 83 F.2d 370 (10th Cir. 1936).

Although there may be no general rule of thumb for distinguishing between mandatory and directory provisions, a statute should be construed according to its subject matter and the purpose for which it was enacted, and the intention of the legislature should be controlling. SANDS, *supra*. Consideration must be given to the legislative history, the language of the statute, its subject matter, the importance of its provisions, their relation to the general object intended to be accomplished by the Act, and finally, whether or not there is a public or private right involved. *Wilcox* v. *Billings*, 200 Kan. 654, 438 P.2d 108 (1968).

In *United States* v. *Morris*, 252 F.2d 643 (1958), a migrant labor agreement between the United States and the Republic of Mexico whereby the United States guaranteed that employers would pay the prevailing wage rate or contract

rate, whichever was higher, required that a "joint determination" that the United States agricultural employer had failed to pay the prevailing wage rate be concluded within ten days. The court held that ten-day requirement was directory only and that a determination concluded some 23 days later was a valid determination.

The court's discussion of the Agricultural Act of 1949 and its legislative intent is appropriate to the question at hand.

> This procedure for joint determination covered many areas of possible controversy in addition to this simpler question of the actual wage paid in comparison to the administratively determined "prevailing wage." With workers scattered over the wide geographical area of this agricultural employment, the scheme of adjustment calling for adjudication by the two sovereigns through selected representatives, each of whom had other governmental duties to perform, and the nature of potential disputes comprising many of substantial complexity and controversy, it is not reasonable to believe that these two Governments intended, by this language, to establish a procedural remedy that would fail altogether for any case, no matter how serious or aggravated, which was incapable of resolution within ten days. On the contrary, these considerations suggest strongly that the ten-day limitation was directory, not mandatory, and prescribed out of recognition that two independent sovereigns with no coercive sanctions available were pledging each other to handle these complaint proceedings with dispatch, that neither would needlessly delay them, and as a specific target, the period of ten days would normally be sufficient.
>
> Whether construed as a statute, or a treaty, or a statutorily authorized contract we discern no intention to adhere to literalism. It is not decisive and must give way to the purpose otherwise so clearly revealed. * * * *United States* v. *Morris*, 252 F. 2d 643, 649 (5th Cir. 1958).

The problems confronted by the Secretary in administering the Alaska Native Claims Settlement Act are of substantial complexity and controversy. It is unreasonable to believe that Congress intended for determinations of village eligibility either to fail or be hastily made because they were incapable of resolution within two and one-half years. Congress intended that the Secretary proceed with dispatch in administering the Act, within the time framework set forth by Congress. Needless delays must be avoided and the schedule must be used as a guideline, but not at all costs.

The timetable set forth by Congress is at best an estimate of time reasonable enough to accomplish the basic purposes of the Act. Two and one-half years was the specific target date set forth by Congress, but it cannot be blindly met at the expense of the basic purposes of the Act, namely a proper and reasoned settlement of long-standing disputes between the Natives, the State of Alaska, and the Federal Government.

It may be difficult to conceive of anything more absolute than a time limitation. And yet, for obvious reasons founded in fairness and justice, time provisions are often found to be directory merely, where a man-

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datory construction might do great injury to persons not at fault, as in a case where slight delay on the part of a public officer might prejudice private rights or the public interest. It has been aptly stated that "when there is no substantial reason why the thing by statute required to be done might not as well be done after the time prescribed as before; [when there is] no presumption that, by allowing it to be done, it may work an injury or wrong; [when there is] nothing in the act itself . . . indicating that the legislature did not intend that it should rather be done after the time prescribed than not done at all—the courts will deem the statute directory merely." *State* v. *Industrial Commission*, 233 Wis. 461, 463, 289 N.W. 769, 771 (1940). *See also Diamond Match Company* v. *United States*, 181 F. Supp. 952 (Cust. Ct. 3d Div. 1960).

There is nothing to indicate that Congress did not intend that the determination should be made by the Secretary after June 18 rather than not done at all. If Congress had intended to dissolve the Secretary's authority to make such determinations of village eligibility after June 18, 1974, it would have been explicit in denying him the exercise of that authority after the two and one-half year period.

Under § 14(a) of the Act, qualified villages—both listed and unlisted—will receive patent to the surface estate of land totaling 22 million acres under sections 12 (a) and (b). If the Secretary could not make eligibility determinations after June 18, 1974, there is a possibility that some listed, but not qualified, villages would receive patents. It would be unfair for the Secretary to distribute land to a village that, in fact, should not qualify as a village at the expense of those villages which Congress intended be granted specific benefits. Denying status as an eligible village to unlisted villages in fact entitled to that status would be an unjust and unfair denial of rights specifically granted by Congress.

In the absence of direct evidence of legislative intent with regard to sections 11(b) (2) and (3), it is appropriate to ascertain that Congress would have intended had it anticipated the situation at hand. *See* SANDS, *supra*, § 57.19. It is difficult to imagine that Congress would have intended that the determinations of village eligibility should suffer because the Secretary could not meet the tremendous statutory burden imposed upon him within a certain time frame. Neither should persons be denied or granted village status by default, nor should decisions of eligibility be made in such a cursory fashion that the rights of all parties to the settlement should suffer. Congress did not intend that a slight "overrun" should prejudice private rights or the public interest. To impose any other solution would be contrary to the spirit of the Act.

Therefore, it is concluded that the two and one-half year provision of sections 11(b) (2) and (3) is di-

rectory, and the Secretary has authority to determine eligibility of villages after June 18, 1974.

/S/ KENT FRIZZELL, *Solicitor.*

ADMINISTRATIVE APPEAL OF JAMES P. BOWEN v. SUPERINTENDENT, NORTHERN CHEYENNE AGENCY, ET AL.

3 IBIA 224

Decided *January 21, 1975*

Appeal from an administrative decision of the Area Director sustaining a decision of the Superintendent refusing to cancel a lease.

Affirmed and Dismissed.

1. Indian Lands: Patent in Fee: Jurisdiction

Issuance of a patent in fee on a trust allotment results in the Secretary's loss of jurisdiction and authority thereover.

2. Indian Probate: Inheriting: Non-Indian—285.2

The United States has no interest to protect in trust lands inherited by a non-Indian, therefore not obligated to provide services or protection to such a person.

APPEARANCES: Clarence T. Belue, Attorney at Law for appellant, James P. Bowen.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

James P. Bowen, hereinafter referred to as appellant, through his attorney, Clarence T. Belue, has filed an appeal from a decision of the Area Director, Billings Area Office, affirming the action of the Superintendent, Northern Cheyenne Agency, in refusing to cancel a farming and grazing lease.

The lease in dispute involves a portion of the original trust allotment of Louis Seminole, Northern Cheyenne Allotment No. 986, described as: E ½ SE ¼ NE ¼ sec. 23, N ½ NW ¼ NE ¼, N ½ N ½ S ½ NW ¼ NE ¼, N ½ NW ¼, SW ¼ NW ¼ sec. 24 all in T. 3 S., R. 41 E., Principal Meridian, Montana, containing 165 acres.

The appellant, a non-Indian, as sole heir, inherited an undivided one-third interest in the subject allotment from his wife, Harriet Spang Seminole Bowen, a Northern Cheyenne enrollee, on January 30, 1970. A patent in fee, No. 25–70–0237, for the said one-third interest was issued to the appellant on April 24, 1970. The remaining undivided two-thirds interest in said allotment remains in trust for the benefit of eight other individual Northern Cheyenne Indians.

On or about June 5, 1970, a lease was granted and approved by the Superintendent, Northern Cheyenne Agency, Lame Deer, Montana, to Henry Sioux for the two-thirds trust interest only. Thereafter, the appellant on September 21, 1973, filed a petition with the Superin-

tendent alleging that the lease to Mr. Sioux was invalid and void since the land was in use and possession of the appellant pursuant to 25 CFR 131.2(a)(4) and 25 U.S.C. § 380 (1970) and that the lease should be declared void and of no effect. On October 29, 1973, the appellant again brought to the attention of the Superintendent his petition of September 21, 1973, and requested a hearing be held to determine the merits of the petition. The Supertinendent on December 14, 1973, advised the appellant that a partition of the land would be the most equitable solution, but that services in that connection could not be extended to appellant since he was non-Indian. On December 17, 1973, in response to the Superintendent's letter of December 14, the appellant again requested that a hearing be granted regarding the validity of the lease to Mr. Sioux. The Supertinendent on December 19, 1973, referred the matter to the Area Director for disposition.

The Area Director on January 15, 1974, informed the appellant that his petition of September 21, 1973, was denied for the following reasons:

(a) Appellant is non-Indian to whom the Bureau of Indian Affairs owes no service.

(b) The Bureau of Indian Affairs has no jurisdiction over appellant's interest in such lands.

(c) This matter is not an issue for which a hearing is authorized by the Federal regulations.

In his appeal it is the appellant's contention that the Bureau of Indian Affairs' jurisdiction and services are not limited to Indians, but are limited to persons defined by 25 CFR 2.1; that the appellant is a person defined by said section and that he has been deprived of a right or privilege as a result of the actions or decisions of the Superintendent and Area Director, and that he has been effectively prevented from the use and enjoyment of his land on account of the lease in question; and that the matter is a proper one for determination of the Superintendent and for appeal pursuant to 25 CFR 2.

At the outset it is noted that the lease in dispute involves individually owned land. The definition thereof appears in 25 CFR 131.1(b) as follows:

"Individually owned land" means land or any interest therein *held in trust* by the United States for the benefit of individual Indians and land or any interest therein held by individual Indians subject to Federal restrictions against alienation or encumbrance. (Italics supplied.)

Authority for the Secretary to grant leases on individually owned lands such as in the case at bar appears in 25 CFR 131.2. In the appeal herein the lease was properly granted under 131.2(a)(4) for the interests held in trust.

Appellant's contention that the Superintendent's action in granting the lease in question was a violation of 25 CFR 131.2(a)(4) and 25 U.S.C. § 380 (1970) and therefore void, is without merit. The record clearly indicates that the appellant's one-third interest in the land in

question is in a fee or nontrust status, and accordingly, the appellant does not fall within the purview of 131.2(a)(4).

It is conceded that the appellant falls within the definition of "person" in 25 CFR 2.1(a). However, it is rather doubtful that the appellant comes within the meaning of 25 CFR 2.1(b) as an "interested party" in that the granting of the lease by the Superintendent in no manner restricts or prohibits the appellant's use of his undivided one-third nontrust interest. It would therefore follow that no "right or privilege" as defined in 25 CFR 2.1 (f) and (g) would be abridged or affected by the action of the Superintendent and Area Director, as to appellant's one-third nontrust interest in the allotment.

[1] The fact that the appellant's one-third undivided interest in the allotment in question is in fee or nontrust status, the Bureau of Indian Affairs and its officials are without jurisdiction or authority to determine the rights of the appellant thereto. *Heirs of C. H. Creciat*, 40 L.D. 623 (1912); *Indian Trust Allotments*, 48 L.D. 643 (1922). Accordingly, appellant's recourse or remedy regarding his rights rests with a court of law. *Chemah* v. *Fodder*, 259 F. Supp. 910 (1966).

[2] Moreover, the Bureau of Indian Affairs is in no manner obligated to provide services or protection for a non-Indian heir. *Bailess* v. *Paukune*, 344 U.S. 171 (1952); *Chemah* v. *Fodder*, *supra*; *Levindale Lead and Zinc Mining Company* v. *Coleman*, 241 U.S. 432, 36 S. Ct. 644, 60 L. Ed. 1080 (1916).

Appellant's final contention that he is entitled to a hearing on the matter is likewise without merit in that his undivided one-third interest is nontrust over which the Bureau of Indian Affairs lacks jurisdiction and any hearing held thereon would serve no purpose. Moreover, we find nothing in Title 25, Code of Federal Regulations, which makes a hearing mandatory in a case such as the one under consideration herein, and neither does the appellant cite any authority for such a hearing.

Considering the appellant's contention in light of the foregoing, the Board concludes and finds the action of the Superintendent and Area Director in refusing to cancel the lease in question and denying the appellant a hearing therein was proper, and their decisions in that respect should be affirmed, and the appeal herein dismissed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior (211 DM 13.7, issued December 14, 1973) and 43 CFR 4.1(2), it is hereby ORDERED that the decision of the Area Director dated January 15, 1974, affirming the decision of the Superintendent, Northern Cheyenne Agency, dated December 14,

1973, be, and the same is hereby AFFIRMED, and the appeal herein is DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

DAVID J. MCKEE,
Chief Administrative Judge.

EASTERN ASSOCIATED COAL CORPORATION

4 IBMA 1

Decided *January 23, 1975*

Appeal by Eastern Associated Coal Corporation from an initial decision and subsequent orders by an Administrative Law Judge in Docket No. HOPE 73-98 modifying an imminent danger order of withdrawal.

Set aside in part, vacated in part, reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Applications for Review: Generally

An Administrative Law Judge is limited to deciding those issues actually presented in an Application for Review and is not authorized to raise any other substantive question *sua sponte* unless it pertains to jurisdiction.

2. Federal Coal Mine Health and Safety Act of 1969: Imminent Danger: Generally

An Administrative Law Judge errs in construing section 104(a) of the Act to grant the Secretary discretion to issue a mandatory order directing an operator to perform any action other than to withdraw persons from an area of a coal mine affected by an imminent danger.

APPEARANCES: Thomas E. Boettger, Esq., and Daniel M. Darragh, for appellant Eastern Associated Coal Corporation; Richard V. Backley, Esq., Assistant Solicitor, Madison McCulloch, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration; Daniel B. Edelman, Esq., for appellee, United Mine Workers of America.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

By decision dated May 17, 1974 in Docket No. HOPE 73-98, an Administrative Law Judge upheld in all respects the validity of an initial imminent danger order of withdrawal (1 JCB, June 19, 1972) and affirmed, and supplemented *sua sponte*, a subsequent modified order of withdrawal (1 JCB, July 10, 1972), on the basis of a finding of a past and *continuing* imminent danger. Both orders had been issued by an inspector of the Mining Enforcement and Safety Administration (MESA) pursuant to subsections (a) and (g) of section 104 of the Federal Coal Mine Health and Safety Act of 1969 [1] and they concerned a waste disposal embank-

[1] 30 U.S.C. § 814(a), (g) (1970).

ment and impoundment facility at the Wharton No. 2 Mine which is located in the State of West Virginia and is owned and operated by appellant Eastern Associated Coal Corporation (Eastern). Subsequent to handing down his initial decision, the Judge made additional findings of fact related to the continuing condition of the disputed facility pursuant to a limited remand ordered by the Board at the request of Eastern. He also issued a series of further orders setting *inter alia* dates for progress hearings and completed abatement.

Eastern has appealed to the Board, charging that several reversible errors were committed by the Judge. First, Eastern contends in substance that the Judge was without authority to make any finding or base any supplemental order on the *continuing* condition of the subject waste facility at any time *after* MESA issued its July 10, 1972 modified withdrawal order since that issue was not raised by the pleadings. Second, Eastern insists that, in upholding the initial withdrawal order and in affirming and supplementing *sua sponte* MESA's subsequent modification thereof, the Judge erroneously construed section 104(a) to grant the Secretary and his delegates discretion in fixing the mandatory terms and conditions of a section 104(a) or (g) order. Third, Eastern alternatively argues that even assuming *arguendo* that the Judge was initially authorized to deal with the continuing condition of the disposal facility here in dispute after July 10, 1972, he erred in finding that there was a present and continuing imminent danger. Finally, Eastern submits that the Judge mistakenly took the position that section 104(a) vests in the Secretary the duty to protect members of the general public from an imminent danger emanating from the coal mine area even though they are not on the operator's property.

For the reasons set forth in detail below, we conclude that, inasmuch as the issue of *continuing* imminent danger was never properly before the Judge, his findings thereof in his initial decision, and subsequently, must be set aside, and his supplemental 105(b) orders, adding obligatory abatement requirements based on those findings, must be vacated. We further hold that the Judge erred in finding that there is discretion in section 104(a) for the Secretary and his delegates to order actions other than the withdrawal of persons from specified areas. Finally, inasmuch as all parties concede that the alleged imminent danger affected miners within the area of the subject mine, the Judge's conclusion regarding the Secretary's supposed independent statutory duty to protect members of the public at large was purely dictum and we see no need to rule on its soundness.[2]

[2] However, *see* 39 F.R. 38660 (November 1, 1974) where the Secretary made the following finding in the process of issuing proposed substantive regulations governing refuse piles and slurry impoundments: *"Finding.* The Federal Coal Mine Health and Safety Act of 1969

I.

Factual and Procedural Background

The source of the alleged imminent danger is the refuse embankment and slurry pond which are behind and used in association with a coal preparation plant at Eastern's Wharton No. 2 Mine. The embankment was gradually formed by the dumping of dry waste consisting of such materials as shale, sandstone, carbonaceous shale, and some coal in a valley known as Rock House Hollow. The dumping of these materials began in 1949 and continued without systematic compaction, without any preconceived engineering design, and apparently without interruption until June 19, 1972, when the initial 104(a) order of withdrawal in this case was issued. By June of 1972, the embankment stood nearly 500 feet in height and its width at the crest was between 1,800 and 2,000 feet.

Commencing in May of 1956, Eastern started to pump slurry through a pipeline from its preparation plant to the nearby area bounded by the embankment and on the sides by the steep walls of Rock House Hollow. The slurry was a waste mixture of fine grains of coal and 70 percent water. In June of 1972, the impoundment contained approximately 130,000,000 gallons of water and the sludge depth was estimated to be anywhere between 180 and 200 feet. As the slurry settled to the bottom against the upstream face of the embankment, water filtered through the wall of the waste pile and discharged into a body of water known as Cow Creek at an estimated rate of 40 to 50 gallons per minute.

In March of 1972, a task force to study coal waste disposal facilities, such as the one involved herein, was formed at the direction of an Assistant Secretary of the Interior.[3] Subsequently, the task force investigated the Wharton facility on June 11, 1972, and communicated its findings to a departmental Hazard Review Board. That Board classified the Wharton embankment as an "imminent hazard," and then related that conclusion to MESA on June 18, 1972. The next day, June 19, 1972, MESA dispatched one of its inspectors, Mr. James Blankenship to the Wharton No. 2 Mine to view the suspect waste disposal facility. Having observed the conditions pointed out by the task force, Inspector Blankenship proceeded to issue the initial section 104(a) order, 1 JCB, which is now before the Board. That order only prohibited the pumping of any more slurry into the impounded area and the dumping of any more dry refuse material upon the existing embankment. The inspector did not order the withdrawal of any persons from those portions of the Wharton No. 2

limits the authority of the Secretary to the promulgation of regulations protecting coal miners on coal mine property, and such limitation is implicit in all the regulations."

[3] This task force was created in partial response to the February 1972 collapse of the Buffalo Creek embankment and impoundment near Laredo, West Virginia, and the resulting killer flood wave.

Mine in the path of a conceivable flood. Those omitted areas were the mine office which was .7 of a mile downstream from the embankment and the mine access road by which nearly all the miners employed at the Wharton mine traveled each day on their way to and from work. *Dec.* 14. The inspector's failure to order withdrawal resulted from acceptance of Eastern's promise to examine the embankment slopes once every eight hours to detect any warning signs of the impending failure of the embankment. (Tr. 283–4.)

On July 10, 1972, Inspector Blankenship issued, pursuant to subsections (a) and (g) of section 104, a modified order of withdrawal. This order continued in effect the mandatory requirements of the June 19 order unless certain terms and conditions enumerated in the order were met. 30 U.S.C. § 104 (a), (g) (1970).

Following the issuance of the modified withdrawal order, Eastern filed an Application for Review specifically challenging both the June 19 and July 10 orders. Both MESA and the United Mine Workers of America (UMWA)[4] filed Answers in opposition averring the validity of the challenged orders in all respects and denying the allegations contained in Eastern's Application. A hearing on the merits was held on October 30 and 31, 1973, and the Judge handed down his initial decision on May 17, 1974. In part, he supplemented MESA's July 10 order by requiring that Eastern take remedial action to achieve a safety factor of 1.3.

On May 28, 1974, Eastern filed a timely Notice of Appeal with the Board. 43 CFR 4.600. Two days later, on May 30, Eastern supplemented its Notice with a more detailed statement of the assignments of error. On June 4, 1974, Eastern moved the Board to hold its appeal in abeyance and to remand the case for the limited purpose of completing the record on the issue of continuing imminent danger. The motion was granted on June 7, 1974.

Subsequently, the Judge held more hearings and issued supplemental memoranda and orders on June 21, June 25, and August 30, 1974. Each of these orders dealt with matters in addition to those encompassed by the Board's remand order of June 7. Eastern amended its Notice of Appeal to include review of these additional orders, charging *inter alia* that the mandatory requirements contained therein exceeded the powers of the Secretary under the Act. Moreover, each of these orders was based on a reaffirmation of the finding of continuing imminent danger made by the Judge in his initial decision of May 17, 1974.

On September 19, 1974, the Board set an initial date for argument on the merits of Eastern's appeal. In addition, the Board declined to disturb any of the Judge's outstanding orders, including those setting

[4] The UMWA appears in this case as a statutory representative of the miners at the Wharton No. 2 Mine. 30 U.S.C. § 815(a)(1) (1970).

abatement deadlines and dates for progress hearings.

On September 27, 1974, MESA moved the Board to clarify the status of the proceeding. In effect, MESA sought reconsideration of the Board's refusal to preclude further proceedings before the Judge during the pendency of the appeal and cited 43 CFR 4.582(c) as authority.[5] Oral argument limited to the merits of MESA's motion was held on October 4, 1974, and on that date, the Board issued a Memorandum and Order granting the motion and vacating its own order of September 19. For the reasons stated in the Memorandum, the Board also continued in effect the supplemented section 104(a) order as it stood on May 17, 1974, terminated the jurisdiction of the Judge, and vacated his outstanding orders setting abatement deadlines and dates for progress hearings. Finally, in order to assure the safety of the miners, the Board directed MESA to continue monitoring safety conditions at the Wharton waste facility and to take such further administrative action under the Act as might be warranted to deal with any deterioration in conditions at the embankment.

On October 10, 1974, the UMWA filed a Motion for Limited Remand. Responses in opposition thereto were then filed by Eastern and MESA, respectively. In a Memorandum and Order dated October 31, 1974, the Board denied the UMWA's motion.

After resolution of this latest motion, Eastern filed a timely brief wherein it waived argument with respect to the question of whether there existed an imminent danger on the date the initial withdrawal order was issued (June 19, 1972) and on the date MESA issued its subsequent modification order (July 10, 1972). Timely reply briefs were subsequently received and oral argument on the merits was held before the Board on November 14, 1974.

II.

Issues on Appeal

A. Whether the Administrative Law Judge erred in finding in his initial decision that a *continuing* imminent danger existed after the issuance of the July 10, 1972 modified withdrawal order when that issue was not raised by the pleadings.

B. Whether the Administrative Law Judge erred in construing section 104(a) to grant the Secretary discretion to issue a mandatory order directing an operator to perform any action other than to withdraw persons from affected areas of a coal mine.

III.

Discussion

A.

[1] Eastern has argued throughout proceedings before the Board

[5] Subsection (c) of 43 CFR 4.582 provides in relevant part as follows: "The Administrative Law Judge's authority in each case shall terminate upon the filing of an appeal from an initial decision * * *."

that the Judge was without authority to make findings in his initial decision and thereafter with respect to the condition of the Wharton embankment and impoundment facility as it existed after the issuance of the July 10, 1972 modified 104(a) order. 30 U.S.C. § 814(g) (1970). Eastern contends in substance that neither section 105 nor the procedural regulations promulgated pursuant thereto authorizes an Administrative Law Judge to decide immaterial factual or legal issues, that is to say, substantive matters not raised by the pleadings.

An examination of the Application for Review that Eastern filed in this case reveals that the allegations of no imminent danger related solely to the condition of the subject waste facility as of June 19 and July 10, 1972. There is nothing in the Application which can be construed to place in issue the condition of the embankment after July 10, 1972. Moreover, the respective Answers in opposition filed by MESA *and the UMWA* are similar in their exclusive preoccupation with the events of the two pertinent dates which are the subject of the Application for Review. Indeed both MESA *and the UMWA* averred that the two withdrawal orders in dispute were valid in all respects. Finally, we observe that neither the UMWA nor any other representative of the Wharton miners filed an Application for Review contending that the waste facility was an imminent danger as of any time after July 10, 1972, or requesting that specific obligatory requirements in addition to those incorporated by MESA in its July 10 withwithdrawal order should be ordered by the Judge pursuant to section 105(b) of the Act.[6]

MESA supports Eastern's position on this issue [7] and agrees that the portions of the initial decision of May 17, 1974 and subsequent orders related to the condition of the subject facility after July 10, 1972 should be set aside or vacated as may be appropriate. Br. of MESA p. 13. MESA also argues that the action of the Judge in reaching *sua sponte* the question of the continuing condition of the embankment and impoundment represents the assumption of a *general* supervisory power over the enforcement activities of MESA in this case which is not permitted by the Secretary's regulations.

Our study of the relevant language and purpose of section 105 of the Act and of the procedural regulations promulgated thereunder as mandatory guidelines for the Administrative Law Judges convinces us that the arguments of Eastern and MESA have merit.

Section 105 provides for administrative review by the Secretary of any order or any subsequent modification or termination thereof at the initiative of an adversely affected operator or representative of miners when an Application for Review is timely filed. Furthermore,

[6] 30 U.S.C. § 815(b) (1970).

[7] The UMWA has not addressed itself to this issue.

the Secretary is directed to conduct an investigation upon receipt of an Application which includes the opportunity for a public hearing of record, subject to provisions of 5 U.S.C. § 554 (1970). Subsection (b) of section 105 requires the Secretary to make findings of fact in a written decision containing a dispositive order vacating, affirming, modifying, or terminating, as appropriate, the section 104 administrative action of which the Applicant complains.

Considered by itself, section 105 is a provision apparently designed by the Congress to afford administrative due process to adversely affected parties regarding complaints that they may have concerning orders or certain notices issued pursuant to section 104. Given this dominant purpose, it seems to us that the legislators intended that the Secretarial investigation under this stautory mandate focus upon the allegations of invalidity and the request for relief submitted by the Applicant for Review. Moreover, since Congress in subsection (c) of section 105 directed a "* * * prompt decision of matters *submitted* to the Secretary * * * consistent with adequate consideration of the issues involved," it is abundantly clear that the focus on the issues raised by the allegations in the Application for Review is to be exclusive (Italics added.). In other words, *potential* substantive areas of investigation of no express or implied interest to the Applicant are not to be explored *sua sponte* by the Secretary or his delegates pursuant to section 105 because raising them can only deny administrative due process by delaying prompt decision of the Applicant's actual complaints, the disposition of which the Congress deemed to be "urgent." 30 U.S.C. § 815(c) (1970).

The regulations promulgated by the Secretary pursuant to section 105 which govern the authority of the Administrative Law Judge also support the conclusion that the Judge in the case at hand erred in reaching out to decide matters not before him. These mandatory guidelines for the Judges reveal *inter alia* that the Secretary's policy is to resolve cases as speedily as is reasonably possible. 43 CFR 4.505 (b). They place the responsibility for framing the issues upon which a record in a section 105 review proceeding is to be made squarely on the Applicant for Review. 43 CFR 4.532. There is nothing in the powers expressly or impliedly granted to Administrative Law Judges which authorizes a Judge to deal with matters not raised by the parties in interest, except of course questions of jurisdiction which may be brought up *sua sponte* at any time. 43 CFR 4.582. *Zeigler Coal Co.*, 3 IBMA 448, 81 I.D. 729, 1974–1975 OSHD par. 19, 131 (1974). Moreover, the regulations clearly do not authorize a Judge to treat an Application for Review as a procedural opportunity to pass judgment upon the actions or omissions of MESA which are not challenged or to grant relief which is not

sought. *See Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149, 1971–1973 OSHD par. 15,367 (1970) and *Clinchfield Coal Co.*, 3 IBMA 154, 81 I.D. 276, 1973–1974 OSHD par. 17,812 (1974).

In emphasizing the limited nature of a Judge's jurisdiction in a review proceeding, we do not mean to imply that he or she is a purely passive figure who blandly calls legal balls and strikes and ultimately announces the winner. A trier of fact always has an affirmative responsibility to exercise his or her discretion to expedite the processing of cases and to make a full record consistent with adequate consideration of the issues involved. We emphasize, however, that in seeking these goals, a Judge must operate within the procedural confines of the Act and the Secretary's regulations. *Compare Kings Station Coal Corp.*, 2 IBMA 291, 80 I.D. 711, 1973–1974 OSHD par. 16,879 (1973) *with Zeigler Coal Co.*, 3 IBMA 64, 81 I.D. 154, 1973–1974 OSHD par. 17,549 (1974).

Although we acknowledge the diligent effort of the Judge to make a record in the case at hand, on the basis of the foregoing, we must hold that the Judge erred in making, *sua sponte*, findings with respect to the condition of the embankment as it existed at any time after July 10, 1972,[8] and in basing thereon supplemental orders pursuant to section 105(b) of the Act. Accordingly, we are setting aside those findings without expressing any views on their merits and we are vacating the orders based thereon.

B.

[2] The remaining question for decision is whether the Judge erred in construing section 104(a) to grant the Secretary and his delegates discertion to issue orders requiring something other than withdrawal of persons, including miners, from specified areas of the mine. More specifically, Eastern contends that the direct, mandatory features of the June 19 and July 10, 1972 withdrawal orders were unlawful.[9] In considering Eastern's contention, we bear in mind that Eastern has waived argument on the issue of the existence of imminent danger on the relevant dates and has thus conceded that such danger then existed.

[8] Some of the additional findings made with respect to the condition of the subject facility after July 10, 1972 by the Judge were responsive to our limited remand order of June 7, 1974. That remand was requested by Eastern and granted without prejudice to Eastern's alternative argument that this issue was not properly before the Office of Hearings and Appeals. It is true that Eastern did not expressly reserve its right to advocate this inconsistent argument in its motion for limited remand; nevertheless, we decline to find a waiver since no regulation presently requires such a reservation and no objection was made on this ground. It should also be pointed out that we granted Eastern's motion before the issues were fully briefed on the merits, including the question of whether the issue of continuing imminent danger was ever properly before the Judge.

[9] The same challenge is made with respect to the Judge's supplemental 105(b) orders which we have already decided to vacate.

In pertinent part,[10] the June 19, 1972, 104(a) order reads as follows:

> This order prohibits the pumping of Preparation Plant water behind the retaining dam and the dumping of Mine Refuse on the dam.

The subsequent modification thereof, dated July 10, 1972, contains the following provisions:

> This order is modified to permit use of the retaining dam on an interim basis until September 11, 1972, provided the following provisions are immediately implemented and maintained:
>
> 1. The operating water level in the pond shall be maintained at least five feet below the previous normal working level of approximately elevation 1475.
>
> 2. Sufficient operating pump capacity shall be maintained at the site to discharge at least twice the normal inflow to the pond from the preparation plant.
>
> 3. The monitoring program shall be implemented immediately to measure and sample water seeping from the downstream face of the embankment.
>
> 4. The top elevation of the solid waste pile shall be maintained at its present level by dozing additionally dumped wastes either upstream or downstream from the alignment of the tramway.
>
> 5. Any areas at the lower portion of the downstream slope which exhibit local sloughing shall be regraded to prevent additional local sloughing.
>
> 6. A field exploration program to extend the present study, as outlined above, shall be initiated as soon as proper drilling equipment can be mobilized to the site.

Neither of these orders requires the withdrawal of persons from any specified areas in the path of a flood which could result from the collapse of the subject embankment.

The Administrative Law Judge in his initial decision upheld the provisions of these orders over Eastern's objections, and in rationalizing his conclusions, he noted that withdrawal of miners from the areas affected by the imminent danger posed by the Wharton waste facility would have encompassed the mine access road and would thus have had the effect of closing the mine and throwing 342 miners out of work. He also took into consideration the fact that closure would have imposed liability on Eastern to pay limited compensation pursuant to section 110(a) of the Act. 30 U.S.C. § 820(a) (1970). He ruled that the Secretary and his delegates have the authority and discretion under section 104(a) to react to an imminent danger by choosing the least disruptive course of action deemed to be consistent with the safety of the miners and others endangered by an imminent danger such as that posed by the condition of the subject Wharton facility.[11]

[10] The order also contains a printed paragraph which was checked by the issuing inspector and reads as follows: "You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act, to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the imminent danger no longer exists or the violation of the mandatory health or safety standard has been abated." None of the parties has adverted to this portion of the order, probably because the inspector failed to make it effective in omitting any description of the area of the coal mine covered thereby.

[11] In addition, at page 85 of his opinion, the Judge rejected the view "* * * that the Act does not vest the Secretary with authority to enforce the operator's common law obligation to abate an imminent peril to public health and safety without notice or an opportunity for hearing." Inasmuch as the federal law

Respondent MESA defends the Judge's conclusions in this phase of Eastern's appeal insofar as its withdrawal orders of June 19 and July 10, 1972 were held valid. MESA contends that its orders represented the most pragmatic, that is, the least disruptive method of separating miners from the danger posed by the embankment. With regard to its July 10 modfiication order, MESA explains that it has been the practice in the past not to terminate a withdrawal order until *all* the conditions which gave rise to such order have been abated, but rather to issue a modification allowing resumption of operations to extract coal. MESA admits in its brief that this practice is technically at variance with the Act, but insists that the operator suffers no harm or prejudice as a result. (Br. of MESA at p. 12.)[12]

The UMWA in its brief is in accord with much of what MESA argues and with all of what the Judge decided. It takes the view that Eastern's argument represents an overly literal reading of section 104(a) which is squarely at odds with the broad purposes of that provision of the Act.

Having considered the language, intent, and purposes of section 104(a) of the Act, we are of the opinion that the Judge, in upholding in all respects the June 19 and July 10 withdrawal orders, did indeed construe the statute to grant to the Secretary and his delegates unduly broad discretion in dealing with an imminent danger. We also are of the view that the failure of MESA to stay within the confines of section 104(a) in drafting its modification order of July 10, 1972 was prejudicial error.[13]

Section 104(a) provides in its entirety as follows:

> Sec. 104. (a) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the area throughout which such danger exists, and thereupon shall issue forthwith an order requiring the operator of the mine or his agent to

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regarding operator obligations to abate an imminent danger is strictly statutory, we presume that this quotation refers to West Virginia case law authorities. We find nothing in section 104 which supports the Judge's conclusion even if we assume *arguendo* that Congress could vest in the Secretary the responsibility for enforcing a purely local body of law. The case law of the West Virginia courts at common law or in equity can neither add to nor detract from the powers of enforcement granted to the Secretary in the Act.

[12] MESA contends that we ought not to consider Eastern's challenge to the validity of its July 10, 1972 withdrawal order because it was never pleaded. Our reading of Eastern's Application for Review satisfies us that this matter was indeed put in issue.

[13] MESA and the Judge also cited the Board's decision in *Zeigler Coal Company* as authority for the proposition that something less than withdrawal of persons can be required under section 104(a). 3 IBMA 54, 81 I.D. 147, 1973–1974 OSHD par. 17,533 (1974). In *Zeigler*, we upheld a section 104(a) order which required the removal of a defective shuttle car because that order was the functional equivalent of ordering withdrawal of miners from the machinery. Zeigler did not contend and we had no occasion to consider the question posed in the instant case, of whether the inspector was authorized under section 104(a) to issue a direct order to abate the hazard. Moreover, *Zeigler* is also distinguishable from the present situation because the hazard had been abated prior to our consideration of the appeal and there could be no question of a possible suit for enforcement by the Secretary pursuant to section 108 of the Act. 30 U.S.C. § 818 (1970). *See* n. 16, *infra*.

cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger no longer exists.

A close reading of the above-quoted statutory mandate reveals that the Congress was specific with regard to the kind of sanction to be imposed upon an operator of a coal mine where an imminent danger is found by an authorized representative of the Secretary. The prescribed sanction with respect to an area involving imminent danger is an "* * * order requiring the operator of the mine or his agent to cause immediately all persons * * * to be withdrawn from, and to be prohibited from entering, such area * * *." The Congress withheld discretion from the Secretary or his delegates to order any other kind of sanction by providing that upon a finding of imminent danger the order withdrawing persons "* * * shall issue forthwith * * *." These words are mandatory and directive, and the legislators could not have been any more clear as to the kind of order to be issued. Congress even went to the extent of reinforcing subsection (a) of section 104 by directing in subsection (e) that "* * * orders issued pursuant to this section *shall* contain * * * where appropriate, a description of the area of the coal mine from which persons must be withdrawn and prohibited from entering." (Italics added.)[14]

In drafting the terms of section 104(a), we think that the legislators deliberately chose to make withdrawal the mandatory sanction, in preference to any other action. We are of the opinion that they intended to have the operator choose between abatement or closing down the affected area entirely. We also believe that they required withdrawal on the basis of a firm policy decision that a condition or practice which threatens to kill or cause serious physical harm at any moment[15] justifies *only* immediate withdrawal of all endangered persons, excepting those essential to abatement.[16] We must conclude that the Congress did not intend that the Secretary or his authorized representative take into consideration, as

[14] The words "where appropriate" in subsection (3) refer to situations where withdrawal of persons from the entire mine is necessary rather than from an area of the mine.

[15] *Freeman Coal Mining Corp.*, 2 IBMA 197, 80 I.D. 610, 1973–1974 OSHD par. 16,567 (1973); *aff'd sub nom. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F.2d 741, 1974–1975 OSHD par. 18,862, No. 73–1909 (7th Cir. 1974).

[16] Only recently, in *Eastern Associated Coal Corporation*, we said: "* * * Section 104(a) is phrased in mandatory rather than permissive terms and an inspector *must* issue an order of withdrawal where he determines that imminent danger exists. We believe that Congress clearly intended this result in such a situation in order to assure that, during and prior to abatement, mining personnel not essential to abatement *remain* withdrawn and are prohibited from entry into the affected area * * *." (Italics in the original.) 3 IBMA 303, 305, 81 I.D. 497, 498, 1974–1975 OSHD par. 18,670 (1974).

did the Judge in this case, the pragmatic elements of resulting interruption in employment and production of coal or of operator liability to pay limited compensation pursuant to section 110 of the Act. In the face of the express command of Congress in section 104(a), we must decline to accept the invitation of MESA and the UMWA to affirm the Judge's conclusion that withdrawal of persons upon a finding of imminent danger is discretionary with the Secretary because such acceptance would dilute the protection that the Congress deliberately afforded to miners against the invariably catastrophic threat posed by an imminent danger.[17]

With regard to MESA's claim that the above-quoted conditions of the July 10, 1972 order represented purely technical or harmless error, we are constrained to point out that the Congress specifically required in section 104(a) that an imminent danger withdrawal order be terminated once "* * * an authorized representative of the Secretary determines that such imminent danger no longer exists." The Board can hardly deprive Eastern of the substantive right to termination that the Congress has expressly granted upon a theory that the failure to do so is technical or harmless error. Moreover, MESA's claim of *no* prejudice ignores the fact that the Secretary may seek enforcement of the mandatory requirements of a section 104 withdrawal order by bringing a suit for injunctive relief pursuant to section 108 of the Act. 30 U.S.C. § 818 (1970). If the Board were to permit the supposedly harmless obligatory requirements and the conditions for lifting those requirements contained in the July 10, 1972 order to remain undisturbed, it would leave Eastern open to the institution of such a lawsuit should the company decide to stand on its rights. Consequently, we reject MESA's argument that it is mere technical error to modify rather than terminate a withdrawal order when imminent danger no longer exists in order to force abatement of each and every condition which gave rise to that finding originally. Absent imminent danger, the remaining conditions may only be dealt with by a notice of violation provided there is an applicable mandatory standard being violated.

Although we hold that section 104(a) allows *only* an order to withdraw persons and does not authorize the Secretary to issue any other kind of direct order, the Board emphasizes that, in drafting a section 104(a) order, an inspector has the discretion and ought, after consultation with responsible mine officials, to include the terms upon

[17] At oral argument, there was a suggestion that a literal interpretation of section 104(a) would result in inflexibility. Although the issue of the existence of imminent danger on June 19 and July 10, 1972 has been conceded by Eastern, the Board is of the view that if the Judge, MESA, and the UMWA believe that the condition of the subject waste facility justified some action less than withdrawal of the miners, then it is possible that their concept of imminent danger sweeps too widely and encompasses "potential" dangers and perils which are insufficiently proximate to be called "imminent." *See* n. 15, *supra*.

which the withdrawal order will be terminated, that is to say, the actions which must be taken to remove at least the "imminence" of the subject hazard. While these terms would in no sense be mandatory or subject to enforcement in a federal district court, they would notify an operator as to what must be done if it wishes to resume operations rather than close down permanently the area described in the order. Of course, the operator may challenge those terms by Application for Review if it believes that it can prove that they require more than is necessary to obviate the factor of imminence or the threat of death or serious bodily harm. Likewise, a representative of miners could file an Application for Review, if it thought that more demanding terms should be imposed.

In light of the foregoing analysis, we ultimately conclude that both the June 19 and July 10, 1972 MESA withdrawal orders were defective in part because they did not require withdrawal of miners from specified areas and they unlawfully imposed upon Eastern a series of alternative obligations. Accordingly, we are reversing that part of the Judge's decision of May 17, 1974 which affirmed the mandatory terms of the subject MESA orders of withdrawal.

Before closing, we deem it appropriate to recapitulate our holdings and to underscore the importance and significance of the unique appellate posture of this case as it became ripe for decision. We have concluded: (1) that the Judge exceeded his authority by making, *sua sponte*, findings with respect to the question of whether the condition of the subject waste facility posed an imminent danger after the issuance of MESA's modified "withdrawal" order on July 10, 1972, and by prescribing, *sua sponte*, his own safety standard and ordering compliance therewith by a certain date; and (2) that MESA's order of withdrawal, dated June 19, 1972, and its modifying order of July 10, 1972, were defective insofar as they imposed upon Eastern mandatory obligations other than the withdrawal of persons from specified areas of the mine. We cannot, however, vacate the two MESA orders challenged in this proceeding because, as this case was submitted to us, Eastern conceded on appeal that the condition of the subject waste facility constituted an imminent danger both on June 19 and July 10, 1972. As a result of that concession, we must presume that *neither* MESA order was null and void *ab initio*. Furthermore, inasmuch as the condition of the Wharton embankment and impoundment subsequent to the issuance of MESA's July 10, 1972 modified withdrawal order was never properly brought before the Judge or this Board and in light of the subsisting dispute on that issue, we cannot conclude that there is no longer any imminent danger and we are not in a position to terminate MESA's outstanding July 10, 1972 order. As a consequence, following issuance of our limited decision in

this case, the parties are left with a defective, unterminated withdrawal order which contains a concededly valid finding of imminent danger as of July 10, 1972. It will be up to MESA to take appropriate administrative action consistent with its view of the condition of the subject waste facility at present so that Eastern may know what its obligations are. Thus, we leave the case in a posture where, if MESA finds no present imminent danger, but determines that some further enforcement action is called for, it may terminate the outstanding withdrawal order with an appropriate finding and issue a notice of violation provided there is an applicable mandatory standard in the substantive regulations. Naturally, any reviewable action which MESA may take is subject to the filing of an Application for Review under section 105 by either Eastern or the UMWA.

The Board emphasizes that it has dealt with this case strictly in the context of the federal law of coal mine health and safety. Our conclusions have nothing whatever to do with any power under local law of executive authorities of the State of West Virginia to impose on Eastern different but not inconsistent orders than MESA or the availability of individual or class relief for a private litigant with standing in a state court possessed of equity jurisdiction.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the findings of continuing imminent danger in Docket No. HOPE 73-98 ARE SET ASIDE and the supplemental orders based thereon that were issued by the Administrative Law Judge, *sua sponte*, on May 17, June 21, and August 30, 1974 ARE VACATED.

IT IS FURTHER ORDERED that the portion of the decision of May 17, 1974, in the above-captioned docket, affirming the mandatory obligations set forth in the withdrawal orders of June 19 and July 10, 1972 IS REVERSED.

DAVID DOANE,
Administrative Judge.

I CONCUR:

JAMES R. RICHARDS,
Ex-officio Member of the Board.
Director,
Office of Hearings and Appeals.

SEPARATE CONCURRING VIEW OF CHIEF ADMINISTRATIVE JUDGE ROGERS:

It appears to me that at some time between the issuance of the initial withdrawal order of June 19, 1972, and the issuance of the modification order of July 10, 1972, MESA determined that imminent danger no

longer existed and upon making such determination properly should have issued an order terminating the June 19 order. Therefore, I would hold that the modification order of July 10, 1972, was and is null and void if it was not predicated upon an existing condition of imminent danger.

C. E. ROGERS, JR.,
Chief Administrative Judge.

ZEIGLER COAL COMPANY

4 IBMA 30

Decided *January 28, 1975*

Appeal by Zeigler Coal Company from a decision of an Administrative Law Judge, dated July 9, 1974 (Docket No. BARB 74-473), dismissing an Application for Review of an order of withdrawal issued pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969.[1]

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Motions

The denial of a motion for a continuance will not be disturbed on appeal, unless it appears that the denial was an abuse of the trial Judge's discretion and resulted in specific prejudice.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Ventilation Plan

Evidence of failure by an operator to adhere to its approved ventilation plan will support the issuance of a notice and order under section 104(b) of the Act.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Richard V. Backley, Esq., Assistant Solicitor and John H. O'Donnell, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Board has carefully reviewed the entire record in this case and affirms the decision of the Administrative Law Judge (Judge). The factual and procedural background of the case and the reasons underlying the Judge's decision are adequately set forth in the decision which is attached and paginated hereinafter. In further support of the Judge's decision, however, we believe a brief discussion of the issues is appropriate.

On appeal, Zeigler's challenges to the findings and conclusions of the Judge may fairly be reduced to two principal issues as follows:

1. Whether the Judge abused his discretion in denying Zeigler's motion for a continuance of the proceedings; and

2. Whether the failure of an operator to comply with a provision of its approved ventilation plan is sufficient to support a notice of violation and subsequent order for failure to abate.

[1] 30 U.S.C. §§ 801-960 (1970), herein "the Act."

Discussion

A.

[1] With respect to the issue on continuance, we note that Zeigler's motion was first made at the outset of the hearing, which was held at Evansville, Indiana, on April 23, 1974. Zeigler's position is that an indefinite postponement should have been granted to permit future consolidation of the application for review with any penalty assessment proceeding which might later arise from the cited violation and closure order. Zeigler argues that it should have been "allowed the opportunity of evaluating MESA's position as to the penalty assessment in determining whether it was economically feasible to go to the expense of litigating the issues in the case." The Mining Enforcement and Safety Administration's (MESA) position is that the Judge, reporter, attorneys for the parties, and witnesses, had traveled a considerable distance and were present and prepared to go ahead with the hearing; that a section 109 petition to assess penalties had not then been filed with the Office of Hearings and Appeals; and that postponement was wholly unwarranted under the circumstances.

In affirming the Judge's denial of the motion for continuance, we believe it sufficient to say that it is well settled that the basis for a continuance rests upon the right of a party to have a reasonable opportunity to try the case upon its merits and that the question of postponement is within the sound discretion of the trial Judge. Therefore, on appeal, this Board will not disturb such a ruling unless the complaining party shows unequivocally that the Judge has abused his discretionary powers and specifically prejudiced the appellant's rights.[2] We fail to perceive wherein Zeigler's rights have in any way been prejudiced by the Judge's ruling and we find no abuse of discretion.

B.

[2] Our review of the record pertaining to the substantive issue here on appeal supports the Judge's findings and conclusions that the amendment to the ventilation plan was valid and therefore was a part of the approved plan in effect at the time of issuance of Notice of Violation No. 1 WAW, January 25, 1974. We also concur in the Judge's finding that the evidence establishes a failure by the operator to adhere to the fire-proofing requirement of the plan, and a failure to abate the violation within the time prescribed by the notice. Therefore, we affirm the Judge's conclusion that the order of withdrawal of February 1, 1974, was properly issued.

We are further of the opinion that underlying the mandate of the Congress in section 303(o) of the Act requiring that each mine have an approved ventilation plan was a recognition that each mine is unique and presents particular ventilation problems which may not lend them-

[2] *See* 43 CFR 4.582(a)(7), *NLRB* v. *Roure-Dupont Mfg. Co.*, 199 F.2d 631 (2d Cir. 1952), and *Lloyd A. Fry Roofing Co.* v. *NLRB*, 222 F. 2d 938 (1st Cir. 1955).

selves to promulgation of general regulations and standards applicable to all mines. Thus, when a ventilation plan for a particular mine is approved by the Secretary, it follows that the Secretary must have powers to enforce adherence to the plan.

The Board has considered Zeigler's contentions as to the applicability of the decision of *United States* v. *Finley Coal Company*, 493 F.2d 285 (6th Cir. 1974), and our decision in *The Valley Camp Coal Company*, 2 IBMA 176, 81 I.D. 294, 1973–1974 OSHD par. 17,849 (1974), to this case, and has determined that they are not applicable under the facts here presented.

Finally, we note that Zeigler requested the Board to set this case for oral argument. After consideration of the entire record, and in view of the foregoing, the Board is of the opinion that oral argument is unnecessary and therefore will deny this request.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that the Judge's Decision and Order of July 9, 1974, in the above-entitled proceeding IS AFFIRMED and the request for oral argument IS DENIED.

C. E. Rogers, Jr.,
Chief Administrative Judge.

I concur:

David Doane,
Administrative Judge.

DECISION

STATEMENT OF THE CASE

July 9, 1974

This proceeding concerns an Application for Review filed by Zeigler Coal Company, pursuant to the provisions of section 105(a) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, *et seq.*, hereinafter the Act. The applicant seeks review of an order of withdrawal issued under section 104(b) of the Act, 30 U.S.C. § 814.

The order of withdrawal (Exhibit G–2) was issued after expiration of the original time fixed by the inspector for abatement of the conditions or practices set forth in a 104(b) notice of violation No. 1 WAW, January 25, 1974. (Exhibit G–1.) The notice reads as follows:

> *Condition or practice.* Violation of the ventilation plan: Doors used in the ventilation system were not constructed of fire retarded [sic] wood. These doors were located on the No. 2 unit supply road, on the oriole bottom and the 1 east off main south supply road.

The notice required the abatement of the aforementioned conditions or practices by 8 a.m., January 31, 1974. Order of Withdrawal 2 WAW, February 1, 1974, reads as follows:

> Notice of Violation 1 WAW dated January 26, 1974, has not been abated. Only a little action has been made to abate this violation.

The order was terminated on February 1, 1974, after the condition was totally abated. The inspector noted that "fire retardant material

was applied to the ventilation doors," and that "these doors were on the No. 2 unit supply road, oriole bottom and 1 east off main south supply road." (Exhibit G–3.)

In its Application for Review, the applicant denied the existence of the conditions or practices alleged in the order of withdrawal. Further, applicant erroneously assumed that the order under review was issued pursuant to section 104(a) of the Act and entered a denial of the existence of any "imminent danger."

The United Mine Workers of America filed an answer in opposition to the Application for Review and erroneously assumed that the order in question was issued pursuant to section 104(c)(2) of the Act, for an alleged violation of 30 CFR 75.400.

The Mining Enforcement and Safety Administration, MESA, filed an answer asserting that the order in question was properly issued under section 104(b) of the Act, and denying all other allegations raised by the applicant.

A hearing on the merits was held on April 23, 1974, at Evansville, Indiana. The United Mine Workers failed to enter an appearance and did not participate in the hearing. Applicant filed proposed findings, conclusions, and a supporting brief. MESA did not.

Motion of continuance.

At the hearing and prior to its commencement on April 23, 1974, counsel for applicant moved for an "indefinite continuance" of the case "until such time as MESA has issued its penalty assessment." (Tr. 4, 5.) MESA opposed any continuance, and after due consideration of arguments by counsel, applicant's motion for continuance was denied. (Tr. 5–9.)

ISSUES

The issues presented in this proceeding are (1) whether the conditions or practices set forth in the notice of violation constitute a violation of any mandatory safety standard under 30 CFR 75.316 as alleged, (2) whether the failure of an operator to follow an approved ventilation plan can form the basis for a 104(b) notice of violation and a subsequent withdrawal order for failure to timely abate the alleged violation, (3) whether the time for abatement was reasonable, and (4) whether the order of withdrawal was warranted and properly issued pursuant to section 104(b) of the Act.

APPLICABLE STATUTORY PROVISIONS

1. The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, *et seq.*

2. Section 105(a)(1) of the Act, 30 U.S.C. § 815(a)(1), which provides in part as follows:

> An operator issued an order pursuant to the provisions of section 104 of this title, or any representative of miners in any mine affected by such order or by any modification or termination of such order, may apply to the Secretary for review of the order within 30 days of receipt there-

of or within thirty days of its modification or termination. * * *

3. Section 104(b) of the Act, 30 U.S.C. § 814(b), which provides:

> Except as provided in subsection (i) of this section, if, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard but the violation has not created an imminent danger, he shall issue a notice to the operator or his agent fixing a reasonable time for the abatement of the violation. If, upon the expiration of the period of time as originally fixed or subsequently extended, an authorized representative of the Secretary finds that the violation has not been totally abated, and if he also finds that the period of time should not be further extended, he shall find the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to to cause immediately all persons, except those referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that the violation has been abated.

DISCUSSION

Testimony and evidence adduced at the hearing.

William Woolridge, an inspector for MESA and an expert on mine safety, was the only witness called by the Government. He testified that he issued a 104(b) notice of violation on January 25, 1974 (1 WAW) because three double ventilation wooden doors were not fireproofed as required by the operator's ventilation plan in violation of 75.316. This condition was a violation of the ventilation plan in that the doors were not fire-retardant or treated with fire-retardant material. He served the notice on Millard Gaddis, the mine safety inspector and discussed with him a list of approved materials that could be used to coat the doors. The materials were available on the market in January 1974, but he "didn't think they had any at the mine property at that time." (Tr. 15–24) (Exhibit G–1).

Mr. Woolridge issued the 104(b) order of withdrawal on February 1, 1974, at 1:45 p.m. and served it on Mr. Gaddis. He (Woolridge) was in the mine continuously each week from January 25, 1974, to February 1, 1974. He allowed the operator until January 31, 1974 to abate the condition, but it was not abated by that date and he discussed the situation with Mr. Gaddis and with Harold Burden, the mine superintendent. He issued no extension, and advised these individuals that "if they will get the job completed before I left the mine (on January 31) that I would abate the Notice." Work had started on the abatement but one set of doors had not been completed by January 31. Nothing was being done to abate the condition. Abatement was being accomplished by painting the doors with a fire-retardant material. Normally, it would take two men two hours to paint one door. He issued the withdrawal order because little effort was made to correct a violation which could have been corrected in a couple of shifts. Between January 31st and the time he issued his withdrawal order, one set of

doors had been completed, but two double doors, four doors in all, had not been touched. (Tr. 24–30) (Exhibit G–2.)

The order of withdrawal was terminated at 5:45 p.m. on February 1, 1974. (Tr. 30–32) (Exhibit G–3.)

Mr. Woolridge testified that each mine has a set of ventilation plans as required by 75.316. These plans are drawn by "ventilation men" in the office and are binding once signed by the operator.

The plans are renewed every six months. The plan in question was drawn and became effective January 1, 1973, and was renewed on November 9, 1973. Coy South, the production superintendent of Zeigler No. 9 Mine signed both plans. He thought that the requirement for fire-retardant doors had been in effect since January 1, 1973. The doors in question were in the mine previous to his 1973 inspections but he did not discuss fireproofing these doors previously because he had not read the ventilation plan clearly (Tr. 32–37).

The approved ventilation plan referred to by Inspector Woolridge is the operator's copy supplied by its counsel and it was received in evidence as Government's Exhibit G–4 (Tr. 37).

On cross-examination by applicant's counsel, Mr. Woolridge testified that he first saw the last page of the ventilation plan sometime prior to the inspection of January 25, 1974. The doors were not installed on Oriole bottom until September or November of 1973. During the inspection in question he examined the ventilation system and methane and dust control plan and found no deficiencies in this regard (Tr. 40–42).

With respect to revisions in the ventilation plan, Mr. Woolridge testified that when revisions are made they are either added onto the existing plan or discussed in a cover letter mailed to the operator. Minor changes or revisions are discussed with the operator. At times, revisions and corrections are made on the plan itself, and any new changes which are added are discussed with the operator and he signs it. It is possible that the addition to the plan in question was accomplished in this manner on January 1, 1973 (Tr. 42–44).

Mr. Woolridge testified that prior to his inspection, he had not noticed the ventilation plan requirements for fire-retardant doors, and some of the doors were installed after the previous regular inspection. There are five coal producing units in the mine, and on the average, the mine produces 2,000 tons of coal per day, per shift. No shift was completely stopped as a result of his order, and one shift was closed at the time his order issued. The mine was shut down for an hour and a half as a result of his order (Tr. 44–47). However, a roof fall which occurred on the main supply road during the midnight to 8 a.m. shift on February 1, 1974, closed the mine to production. He issued his withdrawal order at 1:45 p.m. that same day,

but he knows of no reason why the roof fall would have precluded any work being accomplished on the doors on February 1 (Tr. 47–49).

In response to questions from the bench, Mr. Woolridge testified that all of the doors which are the subject of his order were installed prior to the date of his order. One set, namely those in the No. 2 supply road, were installed during the week of January 20th and the others had been installed for a "good while." He had the plan with him at the time he issued his notice on January 25. He asked the operator for his ventilation plans, and the copy that he saw did not have the last page regarding fire-resistant doors on the plan. The operator's copy was not as up to date as the one introduced at the hearing and was dated 1972. His copy (Woolridge) did have the last page concerning the fire-resistant doors. He allowed the operator five or six days to paint the doors because he was not sure how long it would take to obtain the materials. However, two days after he issued the notice, the materials were available at the mine to complete the doors. It is standard procedure to discuss revisions of the ventilation plans with the operator and if the operator agrees to any revisions he signs the revision (Tr. 53–58).

Mr. Woolridge examined some of the doors each day from January 25 until February 1. He states that the paint was received in a couple of days, that one set of doors (except the framework) was completed by January 31. He informed Mr. Gaddis, the mine safety director, that the notice was due, that he would wait until February 1 to write up an order, but would not extend the notice. Mr. Woolridge found the fireproofing not completed when he arrived at the mine on February 1, at 8:30 a.m. He then told Mr. Gaddis that if the fireproofing was completed when he returned that day he would terminate the notice. Two sets of doors were completed when Mr. Woolridge returned at 1:45, namely those on Oriole bottom and the No. 2 supply road, however, the third set had not been touched. Mr. Woolridge wrote the withdrawal order which closed the entire mine. He stated that he could not abate part of the notice, and that the three sets of doors were on the main intake air and the entire mine would have to close (Tr. 62–69).

In addition to the doors which he cited in his notice of violation and order of withdrawal, there were an additional five sets in the mine. However, some of these additional sets of doors were taken out because of a change in the ventilation. Some of the doors were in areas driven prior to the enactment of the present law, and they did not have to be treated. Another set of doors was constructed before the ventilation plan was revised and they too did not have to be treated. The ventilation plan in effect at the time of the notice of violation only referred to doors that were constructed after the adoption of the plan (Tr. 67–70).

Mr. Millard Gaddis, Safety Director, Zeigler No. 9 Mine was called as a witness for the applicant. He testified that he first became familiar with the mine's ventilation plan (Government Exhibit 4), sometime during the fall of 1973 when a MESA inspector, namely Mitchell Mills, completed a ventilation survey and asked to have a conference with mine management and the safety committeemen. Mr. Mills went over the plan page by page, and he had the only copy. The conference was called to discuss the plan which Mr. Mills had, and once approved, it would become the ventilation plan for the mine. The plan was one which was based on a prior plan. Mr. Gaddis recalled no changes which resulted from the conference, and stated that there were no discussions concerning fireproofing wooden doors. He believed that Stanley Williams represented management during the conference and identified his signature on the last page of Government's Exhibit 4. He did not know whether Mr. Williams was at the conference. The conference was held before November 9, 1973. Coy South was the mine superintendent on November 9, 1973, but Mr. Gaddis could not recall whether Mr. South was at the conference. He identified Mr. South's signature on the covering page of the ventilation plan (Exhibit G–4—Tr. 70–76).

Mr. Gaddis testified that he first became aware that the ventilation plan called for fireproofing of the wooden doors in the haulageways on January 25, 1974. Inspector Woolridge advised him that the doors would have to be fireproofed with approved materials in accordance with the ventilation plan. Mr. Gaddis had a plan in his custody at the time the inspector spoke to him about the doors, but it was the wrong one. His copy did not have the last page concerning the doors, but he found one in the company files which did have the last page attached. He located it in the superintendent's office (Tr. 76–78).

Inspector Woolridge gave Mr. Gaddis a list of five or six suitable substances for coating the doors. One of the substances, namely Stoppit, was ordered. It took two days to obtain it and Mr. Gaddis reminded "different people to get the job done." One door on the bottom was partly finished. However, another set of doors was installed and painted instead of the ones called for in the notice. Two sets were completed, but he thought that the third set had also been completed, but it turned out to be the new ones that were installed. He heard "different stories" and he took the easy way out and hoped that it had been done. He first learned that the last set of doors had not been completed at 1 o'clock when he and Inspector Woolridge went to look at the doors. Had the inspector given him an extension, the doors would have been completed in two or three hours, the same amount of time it took to complete them after the inspector issued the order (Tr. 78–81).

Mr. Gaddis testified that three units were producing coal at the time the order of withdrawal issued. 490 tons were produced during the day shift and the average coal production per shift for all units is approximately 2,000 tons, depending on the personnel and equipment. To his knowledge, nothing other than the order prevented full coal production on the day the order issued. The inspector abated the order as soon as the door was completed (Tr. 81–86).

On cross-examination, Mr. Gaddis stated that the ventilation plan that he had at the time Inspector Woolridge advised him that the doors needed to be fireproofed was an earlier version of the one produced at the hearing. His superior, mine Superintendent Coy South had the later plan. During the period between the time the notice and order issued, Inspector Woolridge discussed the progress being made on the doors, and that he and the inspector looked at the doors from time to time. It would take two men two hours to complete the work on the doors. In response to a question as to an explanation as to why the doors were not completed within the time permitted by the inspector, Mr. Gaddis answered "bad communication." He had no question as to which doors Inspector Woolridge was talking about in his notice. As to any loss of production, two units were not operating because of a roof fall and three units were "called out early" because of the order of withdrawal. He had no opinion as to the actual loss of production in tonnage of coal as a result of the order (Tr. 86–90).

Approximately five men were used to abate the order. However, everyone was called out of the mine, but this was not due to the action of the inspector. Mine management could have directed certain men to remain in the mine to abate the condition, but in this case, everyone came out of the mine (Tr. 90–95).

Motion to vacate

At the conclusion of the testimony of the witnesses, counsel for the applicant moved for vacation of the notice of violation on the ground that MESA had failed to establish a violation of 30 CFR 75.316. In support of this motion, counsel argued that the regulation only requires a ventilation system and methane and dust-control plan be prepared, submitted, and approved and revised from time to time. There is nothing in the regulations requiring fireproofing of doors. The typewritten page regarding fireproofing, was "tacked onto the ventilation plan, * * * sometime last fall." Counsel conceded that it was a reasonable rule and that he did not object to it. However, counsel emphasized that it was not part of the mandatory standards set out in the regulations, but rather, "an informal thing" agreed to by the then superintendent of the mine (Tr. 50–51, 59). Further, counsel argued that Inspector Woolridge did not allow a reasonable time for abatement after discovering the situation. Additional time should have

been allowed in view of the fact that doors other than those cited by the inspector were painted in error, and the closure order was too broad. The entire mine should not have been closed because of the failure to paint one door (Tr. 95–97).

In response to the motion to vacate, counsel for MESA argued that the fireproofing requirements for the doors in question were not "informal and tacked-on" to the ventilation plan. Section 75.316 of Title 30, Code of Federal Regulations, provides for ventilation plans and for suitable revisions. These must be in writing, approved by the Secretary's representative, and is an individual thing for each mine. In the instant case, fireproofing of the doors was required for Zeigler's No. 9 Mine. Fire-retardant material was required by the approved plan (Tr. 51–52). The inspector acted reasonably, and at the time he issued the order of withdrawal was unaware of any alleged "breakdown in communications" as testified to by Mr. Gaddis. The inspector acted in accordance with the terms of the Act by issuing his order when he found the conditions unabated after expiration of the time initially set by him (Tr. 98–100).

The motion was taken under advisement and the parties were advised that it would be considered at the time the briefs are reviewed and a decision rendered (Tr. 100).

Violation of Mandatory Health and Safety Standard

Section 303(o) of the Act, 30 CFR 75.316, provides as follows:

A ventilation system and methane and dust control plan *and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form* on or before June 28, 1970. *The plan shall show* the type and location of mechanical ventilation equipment installed and operated in the mine, such *additional or improved equipment as the Secretary may require,* the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. *Such plan shall be reviewed by the operator and the Secretary at least every 6 months.* (Italics added.)

Section 75.316–1 of the regulations sets forth certain information that must be submitted by the mine operator with respect to its ventilation plan, and section 75.316–2 sets forth the criteria for approval of the ventilation system and methane and dust-control plan. Although section 75.316–1(a)(9) requires the operator to inform MESA's District Safety Manager of the location of ventilation and man doors, there is no specific mandatory safety regulatory standard with respect to the requirement that such doors be fireproofed. The applicant takes the position that since the ventilation plan requirement for the fireproofing of doors is not incorporated in a specific regulatory mandatory safety standard, he cannot be charged with a violation of 30 CFR 75.316 since that regulation only requires that a plan be prepared, submitted, approved, and revised from time to time. Although Applicant's counsel conceded that the fireproofing requirement was reasonable and that he did not object

to it, he maintained that the requirement is not embodied in any mandatory safety standard, and therefore, the applicant could not be held accountable for any violation. (*See* applicant's proposed findings, conclusions, and supporting brief.) MESA takes the position that the requirement for fireproofing of the doors was part of the approved ventilation plan required by 30 CFR 75.316, and by failing to adhere to that plan, the applicant violated mandatory safety standard.

The last page of the ventilation plan in question contains the following:

> The wood used in stoppings, doors, and other ventilation controls will be fire-retardant treated wood or the wood will be coated with material approved by the U.S. Bureau of Mines that provides the same measure of protection as fire-retardnat [sic] wood.

This page contains no date, but does contain the signature of the former superintendent of the mine. Various pages of the ventilation plan carry different effective dates, and although MESA's cover letter to the operator informing him of the approval of the plan contains no date, it does contain the signature of the mine production superintendent and the date "11–9–73" under his signature. MESA's inspector testified the plan became effective January 1, 1973, was last reviewed on November 9, 1973, and he "thought" the aforesaid fireproofing requirement became effective January 1, 1973. Applicant's safety director testified he first became aware of the fireproofing requirement on January 25, 1974, the day the notice of the violation was issued. He located a copy of the plan in the mine superintendent's office and it contained the page quoted above. Although the plan itself was offered and admitted in evidence by MESA (Exhibit G–4), it was in fact the applicant's own copy, which it supplied to MESA's counsel at the hearing. Although testimony at the hearing indicates that prior plans may have existed with the last page missing, the record compiled in this proceeding supports a conclusion that the plan submitted and received in evidence was in fact the approved ventilation plan in effect at the time the notice of violation was issued, and I so find.

The evidence adduced in this proceeding establishes that the doors in question were not fireproofed as required by the ventilation plan at the time the inspector issued his notice of violation. The fact that the inspector may have been somewhat lax by not carefully reviewing the ventilation plan on prior inspections where he failed to cite any violations for doors which were not fireproofed does not detract from the fact that on the day he issued his notice of violation the doors in question were not fireproofed. In addition, his testimony that the ventilation plan only applies to doors constructed *after* the adoption of the plan, although seemingly contradictory to the plain language of the provision itself, does not in itself invalidate his notice. In this regard,

it should be noted that the fireproofing requirement as embodied in the ventilation plan contains no language to indicate that it was intended to apply only to doors constructed after the adoption of the plan or any revisions.

Applicant's arguments in its proposed findings, conclusions, and brief that the failure to fireproof the doors in question does not constitute a violation of 30 CFR 75.316 are not well taken. The purpose of requiring an operator to adopt a ventilation plan is to insure that the mine is operated in such a manner as to provide a safe and healthy working environment for the miner while he goes about his daily chores of extracting coal from the mine. An efficient ventilation system is required so that dangerous accumulations of methane and dust are carried out of the mine. The statutory requirement embodied in 30 CFR 75.316 provides that an operator shall adopt a ventilation plan which must, among other things, show the type and location of mechanical ventilation equipment installed and operated in the mine *and such additional or improved equipment as the Secretary may require*. Thus, it is clear that the statute mandates the adoption of a plan suitable to the conditions and mining system which may prevail in a particular mine, provides for the review of such plan every six months, and authorizes the Secretary to require additional or improved equipment.

In this case, the applicant concedes that the requirement for fireproofing of the doors is reasonable and that it does not object to the requirement. Further, the record establishes that the requirement was in fact part of the applicant's own ventilation plan and that it was reduced to writing and incorporated as part of the plan. Applicant's arguments that the requirement was only "informal" and agreed to only by the then mine superintendent are not well taken. The requirement is specifically set forth in the plan and in the absence of any evidence to the contrary, it is reasonable to assume that the mine superintendent was acting on behalf of his employer at the time he affixed his signature to the adoption of the fireproofing requirement as part of the mine ventilation plan. Applicant's argument that it can ignore its own ventilation plan, which was adopted in the first instance to insure the health and safety of miners, simply because any revisions are not set forth as mandatory regulatory safety standards is unrealistic. The statutory provision in question provides for some flexibility since ventilation plans vary from mine to mine as conditions and mining systems change. As each plan is reviewed and revised, the Secretary is authorized to require additional or improved methods of insuring an adequate ventilation system. Thus, any deviation or noncompliance with the approved plan by an operator necessarily implies a violation of 30 CFR 75.316. To hold otherwise would allow any operator to ignore his own plan with impu-

nity, and would deprive MESA of a means of effective enforcement of the statute. Accordingly, applicant's proposed findings and conclusion with respect to this issue are rejected.

In view of the foregoing, I conclude that the applicant's failure to follow its own ventilation plan by failing to fireproof the doors in question constituted a violation of the provisions of 30 CFR 75.316.

Time for Abatement.

Applicant's counsel has asserted that the inspector (1) failed to allow a reasonable time for abatement after discovering the violation, and (2) that the closure order was too broad in that it was unreasonable to order the closure of the entire mine due to the failure to paint one set of doors. The record in this case establishes that the inspector issued his notice of violation on January 25, 1974, and ordered the conditions abated by 8 a.m., January 31, 1974. Materials necessary to abate the conditions were available to the applicant within two days of the issuance of the notice of violation, and estimates by the witnesses established that two men working two hours could have completed the painting of one set of doors. Since three sets of doors were involved, it is reasonable to assume that the conditions could have been abated during the course of one eight-hour working shift. On January 31, even though the conditions had not been completely abated, the inspector informed the applicant's safety director that he could not extend the notice, but would wait an additional day before writing up an order of withdrawal in order to allow applicant additional time to completely abate the conditions. When the inspector arrived at the mine on February 1 at 8:30 a.m., the conditions had not been totally abated. He gave the applicant additional time that day, and at 1:45 p.m., when the conditions were not totally abated, the inspector issued his order of withdrawal.

In its defense, applicant's safety director asserted that the failure to totally abate the conditions within the time permitted by the inspector was due to "bad communications." Presumably, this was due to a breakdown in communications between the safety director and his own mine personnel since there is nothing to suggest that the applicant did not know what was required to abate the conditions. To the contrary, the mine safety director testified that he had no question as to which doors the inspector was referring to in his notice. Apparently, one of the reasons attributed to the failure to complete the abatement on time was the fact that a wrong set of doors was painted. However, this situation could have been prevented if the mine safety director had been more attentive to the requirements set forth by the inspector. Instead, as he himself testified, he "took the easy way out and hoped" that the work had been done.

Although a roof fall occurred on the main supply road on February

1, 1974, there is no evidence that this event precluded mine management from completing the work required to totally abate the conditions cited in the notice of violation (Tr. 48–49, 85).

In view of the foregoing and under the circumstances of this case, I conclude that the actions by Inspector Woolridge are completely supported by the record and that there has been no showing by the applicant that either the time for abatement or the circumstances surrounding the abatement process were unreasonable.

With respect to the applicant's assertions that the closure order was too broad, section 104(b) of the Act vests discretion in the inspector "to find the extent of the area affected by the violation" and to promptly issue his order of withdrawal. In this case, the Order, on its face, complies with the terms of the Act since the inspector found no imminent danger and concluded that the "entire mine" should be closed. In support of his decision, he testified that the three sets of doors affected by his notice and order were located on the main in-take split of air and that under the circumstances, until all of the doors were completed, he had to order the entire mine closed. The applicant failed to rebut this testimony or to otherwise show why the inspector's closure order was improper. The testimony by applicant's safety director indicates that although mine management could have required some of the men to remain in the mine to abate the conditions, it chose not to do so, but rather, ordered all of the miners out of the mine. The inspector did not order all of the mine personnel out of the mine. In the circumstances, I find that the record supports the action taken by the inspector and that his closure order was not contrary to the statute nor an abuse of discretion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Applicant Zeigler Coal Company was the owner and operator of the Zeigler No. 9 Mine, located at Hopkins County, State of Kentucky, at all times pertinent to these proceedings.

2. Zeigler No. 9 Mine is a bituminous coal deep mine utilizing a room and pillar method of mining, with conventional equipment, employing approximately 300 miners (Tr. 19–20).

3. On January 25, 1974, during the course of his inspection of the Zeigler No. 9 Mine, Federal Coal Mine Inspector William A. Woolridge issued notice of violation 1 WAW pursuant to section 104(b) of the Act, charging the applicant with a violation of the ventilation plan (30 CFR 75.316) in that three sets of double-doors used in the ventilation system were not constructed of fire-retardant wood (Exhibit G–1).

4. Inspector Woolridge fixed the time for abatement of the conditions

cited in the notice of violation as 8 a.m., January 31, 1974.

5. On February 1, 1974, at approximately 8:30 a.m., upon reinspection of the doors in question, Inspector Woolridge found that the conditions cited in his notice of violation were not totally abated. He advised mine management that although he could not extend the abatement time further, he would terminate the notice of violation if the conditions were totally abated "when he returned that day."

6. Upon reinspection of the doors in question at approximately 1:45 p.m., February 1, 1974, Inspector Woolridge found that the conditions had not been totally abated and issued Order of Withdrawal 2 WAW, ordering closure of the entire mine (Exhibit G–2).

7. The conditions described in the aforementioned notice of violation were totally abated by 5:45 p.m., February 1, 1974, and the order of withdrawal was terminated at that time by Federal Coal Mine Inspector William G. Branson (Exhibit G–3).

8. On January 25, 1974, the approved ventilation plan adopted for the Zeigler No. 9 Mine contained a requirement that wooden doors used in the ventilation system be fire-retardant treated wood or coated with materials approved by the U.S. Bureau of Mines (Exhibit G–4).

9. On January 25, 1974, the doors described in the notice of violation failed to comply with the approved ventilation plan adopted for the Zeigler No. 9 Mine in that they were not constructed of fire-retardant wood or coated with approved fire-retardant materials as provided for in the ventilation plan.

10. Materials for abating the conditions cited in the notice of violation were available to the applicant approximately two days after the notice of violation issued, and two men working two hours could have completed the painting of one set of doors.

11. Although a roof fall occurred on the main haulage road of the mine on February 1, 1974, this event did not prevent mine management from totally abating the conditions described in the notice of violation.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

2. At all times pertinent to this proceeding, applicant Zeigler Coal Company was subject to the provisions of the Act.

3. The preponderance of the evidence adduced in this case establishes that the conditions described in notice of violation 1 WAW, issued January 25, 1974, existed and constituted a violation of the approved ventilation plan for the Zeigler No. 9 Mine, which was in effect on that date.

4. Failure of the applicant to follow its approved ventilation plan constitutes a violation of the mandatory health and safety standards set forth in 30 CFR 75.316.

5. The time fixed by the inspector for abatement of the conditions described in the aforementioned notice of violation was reasonable.

6. Failure by the applicant to abate the conditions cited in the notice of violation within the time established by the inspector fully supports the issuance of an order of withdrawal issued by the inspector pursuant to section 104(b) of the Act.

7. Order of Withdrawal 2 WAW, February 1, 1974, was properly issued.

ORDER

WHEREFORE, it is ORDERED:

1. That applicant's motion made at the hearing to vacate the notice of violation is DENIED.

2. Applicant's proposed findings and conclusions, insofar as they are inconsistent with this Decision, are REJECTED.

3. That Order of Withdrawal 2 WAW, February 1, 1974, be AFFIRMED and the Application for Review filed in this proceeding be DISMISSED.

GEORGE A. KOUTRAS,
Administrative Law Judge.

ADMINISTRATIVE APPEAL OF ETHEL H. NOT AFRAID v. AREA DIRECTOR, BILLINGS, ET AL.

3 IBIA 235

Decided *January 31, 1975*

Appeal from an administrative decision denying application for patent in fee.

Affirmed and dismissed.

1. Indian Lands: Allotments: Patents: Applications

Application for patent in fee will be denied where applicant is found incapable of properly or adequately managing her own affairs.

APPEARANCES: Stanton, Hovland & Torske, Attorneys at Law, for Ethel H. Not Afraid, appellant.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before this Board on an appeal by Ethel H. Not Afraid, hereinafter referred to as appellant, through her counsel, Stanton, Hovland & Torske, from a decision of the Area Director, Bureau of Indian Affairs, Billings, Montana, dated March 13, 1974. The Area Director's decision affirmed the decision of December 19, 1973, of the Superintendent, Crow Agency, in denying appel-

lant's application for a patent in fee for her original Allotment Crow No. 3398 described as: all of section 7, N½ NW¼, N½ S½ NW¼, section 18, T. 6 S., R. 30 E., Principal Meridian, Montana, containing 760 acres, more or less.

The appellant filed her application with the Superintendent of the Crow Agency on September 21, 1973, giving in support of her application the following reasons:

> To pay off the Crow Tribal Loan, medical needs for (sic) supplies cause I'm a diabedic (sic); To help my only son to purchase some land around close by his ranch to enlarge the ranch.

The Superintendent on December 19, 1973, advised the appellant that the Crow Tribal Land Resource Committee at its November 21, 1973, meeting indicated an interest in purchasing the tract of land involved in the application and that action thereon was being withheld pursuant to 25 CFR 121.2 which in pertinent part provides:

> Action on any application, which if approved would remove Indian land from restricted or trust status, may be withheld, if the Secretary determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have had a reasonable opportunity to acquire the land from the applicant. * * *

The appellant on January 7, 1974, appealed the Superintendent's decision to the Area Director, Billings. In support of her appeal, the appellant cites the Board's conclusion in the *Administrative Appeal of Frances M. Shively Kevern*, 2 IBIA 123, 80 I.D. 804 (1973), to the effect that the Department of the Interior could not withhold the issuance of a patent in fee solely for the reason provided in 25 CFR 121.2.

The Area Director in his decision of March 13, 1974, sustained the Superintendent's decision of December 19, 1973, in the following language:

> Accordingly, the decision of the Superintendent not to approve Mrs. Not Afraid's application for a patent-in-fee is affirmed on the grounds that neither the tribe nor individual Indians have had an opportunity to acquire the property and thereby keep Indian lands in Indian hands and we further deny this appeal on the grounds that Mrs. Not Afraid is not competent to handle her affairs and that the removal of the subject tract from her ownership would critically impair her annual income.

In support of his denial on competency grounds, the Area Director, among other things, set forth the following reasons:

1. The appellant is 54 years of age, in poor health, being afflicted with diabetes and a heart condition.

2. The appellant has only an 8th grade education, without any specialized training and has been employed from time to time as a kitchen aide and a bus driver.

3. That the appellant is delinquent on a tribal RCF loan in the amount of $2,707.55 and on another tribal loan in the amount of $210.05.

4. A duplex situated in Lodge Grass, Montana, which the appellant purchased in February 1963, is now unoccupied and uncared for.

5. The appellant resides in a Turnkey III home situated on her

daughter's land on which she is, as of February 1, 1974, behind in her rentals in the amount of $585 to the Crow Housing Office and that she has paid no rent on the home for eleven (11) months.

6. The appellant, as security for her tribal loans and eligibility for tribal housing, has assigned the income from her only wholly owned asset-producing income (land subject of the application) and

7. To allow her to dispose of her only wholly owned asset would not be in the appellant's best interest.

It is from the decision of March 13, 1974, that the appellant has appealed to this Board.

The appellant in support of her appeal contends that her allotment of land, subject of the application, was to be held in trust for her sole use and benefit and that upon the expiration of the trust period, or upon her being classified as competent and capable of managing her affairs, whichever occurred first, the Secretary of the Interior was to cause to be issued to her a patent in fee simple. The appellant considers the foregoing to be the law and cites in support thereof the *Administrative Appeal of Frances M. Shively Kevern*, *supra*, wherein the Board of Indian Appeals at 2 IBIA 128, 80 I.D. 806 stated that:

> We are of the opinion that the contents of the General Allotment Act referred to *supra*, clearly express the legislative intent and the dictates of Congress, *i.e.*, that the United States will cause to be issued to the allottee a patent in fee simple, if before the expiration of the trust period the Indian allottee becomes competent and capable of managing his or her own affairs.

The appellant apparently contends this appeal is in all respects similar to the *Kevern* case, *supra*, and is governed thereby. We disagree. The *Kevern* case differs from this appeal in two respects. First, in the *Kevern* case, *supra*, there was no question as to the applicant's competency to handle her own affairs, whereas the appellant's competency in this appeal is in issue. Secondly, the provisions of 25 CFR 121.2 were inapplicable in the *Kevern* case since her application was filed prior to May 23, 1973, the effective date of said provisions, whereas in the appeal herein the appellant's application was filed on September 21, 1973, and therefore subject to the said provisions. Accordingly, we see no departure from our ruling in the *Kevern* case as applied in the appeal herein.

The record indicates that the appellant's application for a patent in fee was denied on the following grounds:

(1) That the approval of the application would adversely affect the best interests of the tribe or other Indians, pursuant to 25 CFR 121.2, and

(2) Incompetency of the applicant to properly manage her affairs.

Withholding action on appellant's application pursuant to 25 CFR 121.2 by the Superintendent in itself would have been proper and valid provided the provisions

thereof had been complied with. Unfortunately, the record as presently constituted, indicates only a casual interest by the Tribe through its Crow Tribal Land Resources Committee in purchasing the allotment. No firm written commitment or offer in that respect appears in the record. No further action appears to have been taken in the matter subsequent to the committee's meeting of November 21, 1973. Under the foregoing circumstances it must be concluded and found that the Tribe and other Indians have had reasonable opportunity to acquire the land from the appellant or at least to have entered into serious negotiations in connection therewith. To expect the appellant to extend indefinitely the opportunity under these circumstances would be entirely unreasonable.

Incompetency as the final ground for denying the application on the other hand must be sustained. Definition of competent with respect to patents in fee appears in 25 CFR 121.1(e):

> "Competent" means the possession of sufficient ability, knowledge, experience, and judgment to enable an individual to manage his business affairs, including the administration, use, investment, and disposition of any property turned over to him and the income or proceeds therefrom, with such reasonable degree of prudence and wisdom as will be apt to prevent him from losing such property or the benefits thereof.

25 CFR 121.5(a) further provides in pertinent part that:

> An application may be approved and fee patent issued if the Secretary, *in his discretion*, determines that the applicant is competent. * * * (Italics supplied.)

[1] The Area Director, after reviewing and considering the appellant's application along the lines set forth in 25 CFR 121.1(e), as a matter of discretion, found the appellant to be incompetent and incapable of properly managing her affairs. Accordingly, the Board finds no reason to disturb the Area Director's finding in that respect, and it should be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7 and 43 CFR 4.1(2), the decision of the Area Director, Billings, dated March 13, 1974, denying appellant's application for a patent in fee on the grounds of incompetency be, and the same is hereby, AFFIRMED and the appellant's appeal is DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1975

ESTATE OF BENJAMIN HARRISON STOWHY (DECEASED YAKIMA ALLOTTEE NO. 2455) AND ESTATE OF MARY G. GUINEY HARRISON (DECEASED COLVILLE ALLOTTEE NO. S-925)

3 IBIA 243

Decided *February 4, 1975*

This decision is issued pursuant to the consent judgment of the United States District Court, Eastern District of Washington, in the case of Goheen, et al. v. Morton, et al. v. Tahkeal, et al., Civil No. 2879, issued December 23, 1974, wherein the court approved a stipulation for settlement entered into by the parties.

Remanded.

1. Indian Probate: Generally—100.0—Indian Probate: Judicial Review: General—300.0

Where the constitutionality of the Act of December 31, 1970 (25 U.S.C. § 607, 84 Stat. 1874) is challenged in court, the parties are not precluded from entering into a stipulation for settlement upon which the court may enter a consent judgment rendering a ruling upon the constitutional issue unnecessary.

APPEARANCES: C. James Lust, attorney for the plaintiffs as realigned, except the Plaintiff Rosemary Kalama appearing by attorney Gilbert H. Kleweno; Patrick Cockrill, attorney for the intervenor Esther E. Monjarez; the defendants Rogers C. B. Morton and Martina Guiney Grey were represented by Dean C. Smith, United States Attorney before the Court, but he does not appear before the Department. It is anticipated that Rogers C. B. Morton, Secretary of the Interior, will be represented by the Solicitor for the Department and that Martina Guiney Grey will be represented by an attorney yet to be named.

ORDER BY CHIEF ADMINISTRATIVE JUDGE McKEE

INTERIOR BOARD OF INDIAN APPEALS

[1] This Board issued its decision in the two estates on June 30, 1972, 1 IBIA 269, 79 I.D. 428 (1972), in which it denied jurisdiction to pass upon the constitutionality of a statute of Congress, the Act of December 31, 1970 (25 U.S.C. § 607, 84 Stat. 1874), in its application to the passing of the land interests on the Yakima Reservation owned by Benjamin Harrison Stowhy, an enrolled Yakima Indian on his death on March 8, 1968, and the passing of such interests plus additional interests upon the death of his wife, Mary G. Guiney Harrison, a Colville enrollee who died December 2, 1968. The Board directed that the Judge's orders approving the wills of the two decedents should be affirmed after modification of the order of distribution of the estate of the wife from which a devise to Margaret McDonald had been omitted.

Certain relatives of the decedent, Benjamin Harrison Stowhy, filed

an action in the United States District Court for the Eastern District of Washington claiming to be heirs under the Act of August 9, 1946 (25 U.S.C. § 607, 60 Stat. 968) amended by the Act of December 31, 1970, *supra*, and alleged the amendment deprived them of the property which they had inherited under the 1946 Act. They challenged the constitutionality of the 1970 Act on that ground. The original plaintiffs joined others known to have relationship to the decedent, Benjamin Harrison Stowhy, as third party defendants, all of whom except three were realigned by the Court as plaintiffs. Those not realigned were personally served, and upon failure to appear were adjudged by the Court to be in default.

Esther E. Monjarez, also known as Esther Simmons Monjarez, intervened contesting the validity of the will of Mary G. Guiney Harrison on its merits alleging mistake and undue influence, and she remained designated as an intervenor. The defendant, Martina Guiney Grey, a devisee named in the will of Mary G. Guiney Harrison remained as the sole defendant having an interest in the estate with the defendant Secretary Rogers C. B. Morton being named in his official capacity only.

During the course of the litigation the interested parties, except those adjudged to be in default, entered into a stipulation for settlement subject to approval by the Secretary of the Interior, of the attorneys' fee provision therein, and subject to the approval of the Court. The Secretary issued his approval of the provision for attorneys' fees and the Court approved the balance of the stipulation without reference to the fees in its Consent Judgment entered December 23, 1974. By this judgment the Secretary of the Interior is directed to issue those orders necessary to implement both the Consent Judgment and the stipulation. No stay of execution of the Consent Judgment is afforded the parties.

NOW, THEREFORE, it is ORDERED by authority of the Court as aforesaid and by the authority of 43 CFR 4.1(5) that the Administrative Law Judge having the probate authority over the estates of deceased Indians on the Yakima and Colville Reservations shall take the following action:

A. In the Estate of Benjamin Harrison Stowhy, Probate No. IP PO 88K 71:

1. He shall enter an order to the Bureau of Indian Affairs directing immediate payment from the funds in the estate account of the claims against the estate previously approved;

2. He shall enter an order to the Bureau of Indian Affairs directing the immediate payment from the funds in the estate account of the total sum of $6,000, said payment to be made $5,000 to Esther E. Monjarez, also known as Esther Stowhy Monjarez (Intervenor) personally, and $1,000 to Patrick Cockrill, her attorney, said payment to be for attorney fees hereby approved;

3. The balance of the funds in the estate account on December 23, 1974, shall be immediately divided into two equal parts to be paid separately: one half as provided in paragraph 7 hereof to the group named in the Consent Judgment of December 23, 1974, as plaintiffs [1] in shares to be determined upon establishment of the plaintiffs' individual rights as heirs of the decedent under the laws of descent of the State of Washington, after hearings, as hereinafter provided in paragraph 4 hereof; and one-half to the account of the *Estate of Mary G. Guiney Harrison*, deceased Colville Allottee in Probate No. IP PO 120K 71 (April 11, 1972);

4. He shall order distribution from the land inventory in this estate the decedent's interest in Yakima allotment described as that portion of tract number 124–2454 described as NE ¼ SW ¼ sec. 25, T. 11 N., R. 18 E., W. M. Washington, containing 40 acres more or less and Yakima allotment described as tract number 124–2455 described as S ½ SW ¼ sec. 25, T. 11 N., R. 18 E., W. M. Washington containing 80 acres more or less to the group named in the Consent Judgment of December 23, 1974, as plaintiffs, as tenants in common, in shares to be determined upon establishment of their individual fractional rights as heirs of this decedent under the Act of August 9, 1946, *supra*, in force at the date of decedent's death and the laws of descent of the State of Washington after hearings; [2]

5. He shall order distribution from the land inventory in this estate subject to the provisions of paragraph 8 herein the decedent's interest in Yakima allotment described as tract number 124–2453 described as S ½ NW ¼ of sec. 25, T. 11 N., R. 18 E., W.M. Washington, containing 80 acres more or less and Yakima allotment described as tract number 124–1819 described as SW ¼ NE ¼, NW ¼ SE ¼ sec. 2, T. 10 N., R. 17 E., W.M. Washington, containing 80 acres more or less to the living successor in interest, Martina Guiney Grey, a Colville enrollee, as the devisee of the land interests named in the will of Mary G. Guiney Harrison, a Colville enrollee, the subsequently deceased widow and sole devisee of this decedent;

6. The stipulation for settlement provided for allowance of attorneys' fees which is hereby approved for

[1] The group designated in the Consent Judgment to receive distribution from this estate as plaintiffs, although all are not realigned, are individually named as follows: Maggie E. Goheen, Charles P. Eyle, Elizah Lewis, Elsie Sam, John T. Eyle, Jr., Evans Lewis, Edgar Lewis, Ernest Lewis, Franklin Carl Nash, Dennis Frank Nash, Edith Mae Nash, Gloria E. J. Nelson aka Joan Graham, William Eyle, Sr., Rosaline Yallup Napoleon, Dixie Eyle Ham, Cindy Rae Eyle (a minor) and Rosemary Kalama.

[2] The Judge shall follow the applicable procedure provided for determination of heirs and probate of Indian estates appearing as 43 CFR §§ 200 *et seq.*; the decision shall be subject to the appeal provisions of that part of the regulations; and the defaulted defendants Allen Tahkeal, Alexander Eyle, Jr. and Florence Stover, or their successors, shall not be included to share in the distribution.

the respective parties (no provision is made for the defendant, Martina Guiney Grey, represented by Dean C. Smith, United States Attorney). The stipulation provided for payment of fees which are held to be individual obligations and not claims against the estate: for C. James Lust, attorney for the plaintiffs except Rosemary Kalama represented by Gilbert H. Kleweno, the sum of $22,500 including reimbursement for costs and expenses advanced; for Gilbert H. Kleweno, attorney for plaintiff Rosemary Kalama, the sum of $250; for the intervenor's attorney, approval and payment is provided in paragraph 7;

7. The payment provided in paragraph 3 for the group identified as "plaintiffs" shall be made to their attorneys as follows: to Gilbert H. Kleweno not to exceed $250 which shall be charged against the interest of Rosemary Kalama to be later determined; and to C. James Lust not to exceed $22,500 to be charged against the interests of the other plaintiffs to be later determined. Nothing herein shall bar immediate payment of available funds with allocations to be made against the interests of the respective parties, except Rosemary Kalama, for whom provision is made above. Payments shall continue from time to time until the specified amounts are reached as income is received from the lands distributed to the plaintiffs herein;

8. The proceedings in this estate and in the *Estate of Mary G. Guiney Harrison*, deceased, were not complete but were pending before the Department on December 31, 1970, the date of passage of 84 Stat. 1874, and sec. 2 thereof brings this estate proceeding within the purview of that Act. Upon issuance of the order of distribution in compliance with paragraph 5 of this decision, notice thereof shall be given to the Yakima tribe. Further proceedings conducted in relation to disposition of the land interests of this decedent on the Yakima Reservation shall be governed by 43 CFR 300 *et seq.*, effective September 30, 1974 (39 FR 31635).

B. In the *Estate of Mary G. Guiney Harrison*, deceased, Probate IP PO 120K 71 (April 11, 1972):

1. The interest of Esther E. Monjarez is confirmed in that part of the allotment of Cecelia Stowhy No. 124–2454 which Benjamin Harrison Stowhy, a Yakima enrollee, inherited and conveyed by deed to his wife, Mary G. Guiney Harrison, a Colville enrollee, during his lifetime and which was in turn conveyed by deed during her lifetime to Esther E. Monjarez, a Colville enrollee, said tract being five acres of the NW¼ SW¼ sec. 25, T. 11 N., R. 18 E., W. M. Washington described as:

Beginning at the northwest corner of the NW¼ SW¼ of sec. 25, T. 11 N., R. 18 E., W. M. Washington, thence south 490 feet to the true point of beginning; thence east 660 feet, thence south 330 feet, thence west 660 feet, thence north 330 feet to the true point of beginning, containing 5 acres more or less.

The Yakima tribes have no right to purchase this tract under either the Act of August 9, 1946 (60 Stat. 968) or the amendment thereof by the Act of December 31, 1970 (84 Stat. 1874), both codified as 25 U.S.C. § 607, since title passed by *inter vivos* conveyance and not by inheritance or by will upon death of the owner.

2. The Administrative Law Judge shall modify his order approving the will of Mary G. Guiney Harrison, deceased, entered April 11, 1972, Probate No. IP PO 120K 71 and his distribution of the estate to provide for distribution according to the will of two acres of the allotment of Cecelia Stowhy No. 124–2454 on the Yakima Reservation described as:

> Beginning at the northwest corner of the NW¼SW¼ sec. 25, T. 11 N., R. 18 E., W. M. Washington, thence south 358 feet to the true point of beginning; thence continuing south 132 feet, thence east 660 feet, thence north 132 feet, thence west 660 feet to the true point of beginning, containing 2 acres more or less

said distribution to be made *nunc pro tunc* to the devisee Margaret McDonald, a subsequently deceased enrollee on the Colville Reservation. Upon the probate of her estate it appears the said two-acre tract will pass to her successors in interest, Esther Simmons Monjarez and Ezra M. Simmons, Jr., subject to the option of the Yakima tribe to take it as passing under the will of Mary G. Guiney Harrison, deceased, pursuant to the provisions of the Act of December 31, 1970, *supra*. Proceedings therefor shall be conducted in accord with the provisions of 43 CFR §§ 300 *et seq.*, effective September 30, 1974 (39 FR 31635).

3. The distribution ordered by the Administrative Law Judge in the *Estate of Mary G. Guiney Harrison*, deceased, Probate No. IP PO 120K 71 on April 11, 1972, to Martina Guiney Grey, a Colville enrollee, of that part of the allotment of Cecelia Stowhy No. 124–2454 described as the NW¼SW¼ sec. 25, T. 11 N., R. 18 E., W. M. Washington, except 5 acres conveyed as described in paragraph B–1 hereof and except two acres devised as described in paragraph B–2 hereof, containing 33 acres more or less, is confirmed. The interest of Martina Guiney Grey is held subject to the right of the tribe arising from the Act of December 31, 1970, *supra*. The Judge shall notify the tribe of this right, and he shall conduct such additional proceedings as are necessary and appropriate according to the provisions of 43 CFR §§ 300, *et seq.*, effective September 30, 1974 (39 FR 31635).

4. The Order by the Administrative Law Judge entered on April 11, 1972, in the *Estate of Mary G. Guiney Harrison*, deceased, Probate No. IP PO 120K 71, approving the decedent's will including the residuary clause thereof and distributing the estate is approved and confirmed except as herein specifically modified, and such distribution shall be accomplished at the

earliest possible date to be followed from time to time as any additional assets, real or personal, shall be discovered or shall become a part of the estate account.

It is further ORDERED that the Administrative Law Judge shall take such other and further action in addition to that provided herein as may be necessary or appropriate to satisfy the requirements of the stipulation and the Consent Judgment.

This decision is final for the Department subject to the right of an aggrieved party to appeal from any new decision of the Administrative Law Judge in proceedings herein required.

DAVID J. MCKEE,
Chief Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

HYDROTHERMAL ENERGY AND MINERALS, INC.

18 IBLA 393

Decided *February 7, 1975*

Appeal from separate decisions of Oregon State Office, Bureau of Land Management, rejecting applications OR 11701 and OR 11708 for noncompetitive geothermal leases.

Affirmed as modified.

1. Bureau of Land Management—Geological Survey—Geothermal Leases: Known Geothermal Resources Area

There is no authority for a State Director, Bureau of Land Management, to make a determination of a known geothermal resources area. Instead, that authority has been delegated by the Secretary of the Interior to the Director, Geological Survey. KGRA determinations must be based upon the evidentiary factors stated in section 2(e) of the Geothermal Steam Act of 1970.

2. Act of December 24, 1970—Geothermal Leases: Competitive Leases—Geothermal Leases: Known Geothermal Resources Area—Geothermal Leases: Noncompetitive Leases

Section 4 of Geothermal Steam Act of 1970 authorizes competitive bidding as sole basis for issuance of geothermal leases for lands determined to be within a KGRA.

3. Act of December 24, 1970—Geothermal Leases: Competitive Leases—Geothermal Leases: Known Geothermal Resources Area—Geothermal Leases: Noncompetitive Leases

Section 4 of Geothermal Steam Act of 1970 directs competitive bidding for geothermal leases on lands which are determined to be within a KGRA before the issuance of a lease on such lands, even though the KGRA determination is made after the pertinent application is filed.

4. Act of December 24, 1970—Geothermal Leases: Competitive Leases—Geothermal Leases: Known Geothermal Resources Area—Geothermal Leases: Noncompetitive Leases

Competitive bidding requirements of first sentence of section 4 of Geothermal Steam Act of 1970 apply to those applications filed during January 1974 filing period, and State Office rejections of appellant's January 1974 noncompetitive lease applications are proper under 43 CFR 3210.4.

APPEARANCES: Jerome S. Bischoff, Esq., Portland, Oregon, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

Hydrothermal Energy and Minerals, Inc. (Hydrothermal) has appealed from separate decisions, each dated April 12, 1974, wherein the Oregon State Office, Bureau of Land Management, rejected applications OR 11701 and OR 11708 for noncompetitive geothermal leases. Each decision declared that the lands applied for are within a "known geothermal resources area" [1] (KGRA) by virtue of competitive interest [2] demonstrated. Hydrothermal's applications were filed on January 31, 1974, during the initial 30-day filing period following the date upon which the regulations [3] permitting geothermal leasing of United States owned lands became effective.

Appellant contends essentially that the KGRA competitive leasing provisions are not applicable to filings made during the initial 30-day filing period provided by the regulations, and that in any event a determination that a KGRA exists presupposes an administrative finding based on evidentiary factors.

[1] We accept the contention of appellant that a KGRA determination requires more than the mere declaration by a State Director that a KGRA exists. KGRA determinations must be based upon evidentiary factors which are stated in section 2(e) of the Geothermal Steam Act of 1970, 30 U.S.C.A. § 1001(e),[4] and in the geothermal leasing regulations. Competitive interest is one of these factors. The authority to make KGRA determinations has been delegated by the Secretary of the Interior to the Director, Geological Survey, 220 DM 4.1(H).

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[1] As defined in section 2(e) of the Geothermal Steam Act of 1970, 30 U.S.C.A. § 1001(e), a "known geothermal resources area" is one "* * * in which the geology, nearby discoveries, competitive interests, or other indicia would, in the opinion of the Secretary, engender a belief in men who are experienced in the subject matter that the prospects for extraction of geothermal steam or associated geothermal resources are good enough to warrant expenditures of money for that purpose."

[2] The term "competitive interest" which is used in section 2(e) of the Geothermal Steam Act, note 1, *supra*, is defined in the regulations governing geothermal leasing, 43 CFR 3200.0-5(k)(3), as follows: "'Competitive interest' shall exist in the entire area covered by an application for a geothermal lease if at least one-half of the lands covered by that application are also covered by another application which was filed during the same application filing period, whether or not that other application is subsequently withdrawn or rejected. * * *" As section 2(e) of the Act makes clear, competitive interest is but *one* of *several* criteria that must be considered *together* in determining whether or not an area is a KGRA.

Application OR 11701 was in conflict for more than one-half the lands it covered with applications OR 11713 and OR 11763; application OR 11708 was similarly in conflict with application OR 11877.

[3] 43 CFR 3200 *et seq.*, which became effective on January 1, 1974.

[4] 30 U.S.C.A. § 1001(e) reads:

"'[K]nown geothermal resources area' means an area in which the geology, nearby discoveries, competitive interests, or other indicia would, in the opinion of the Secretary, engender a belief in men who are experienced in the subject matter that the prospects for extraction of geothermal steam or associated geothermal resources are good enough to warrant expenditures of money for that purpose."

We have found no authority for a State Director to make a determination of a KGRA.

When they were promulgated, the State Office decisions were in error to reject the subject applications on account of being for lands in a KGRA. The issue is now moot, however, as an authorized official of the Geological Survey on May 3, 1974, acting in accordance with section 2 (e) of the Geothermal Steam Act, *supra*, subsequently determined that the lands included in the subject application are in fact within undefined additions to the Vale Hot Springs KGRA and the McCredie Hot Springs KGRA, Oregon, respectively, effective as of February 1, 1974. The State Office decisions are so modified.

We find nonpersuasive appellant's argument that applications for noncompetitive geothermal leases filed prior to the effective date of a KGRA determination may be accepted.

[2] Section 4 of the Geothermal Steam Act, 30 U.S.C.A. § 1003, requires that:

> If lands to be leased under this Act are within any known geothermal resources area, they shall be leased to the highest responsible qualified bidder by competitive bidding under regulations formulated by the Secretary. If the lands to be leased are not within any known geothermal resources area, the qualified person first making application for the lease shall be entitled to a lease of such lands without competitive bidding. * * *

Thus, this section of the Act authorizes competitive bidding as the sole basis for issuance of geothermal leases for lands determined to be within a KGRA.

Appellant has raised the question of the proper meaning of the phrase "* * * which are not within any KGRA * * *" found in the first sentence of 43 CFR 3210.1 (b),[5] and has argued that this language does not allow KGRA determinations following the time of the filing of applications to preclude the noncompetitive leasing of pertinent lands. Since a decision upon the ultimate issue of this appeal requires consideration of the application of the Geothermal Steam Act to the facts and issues presented herein, and because section 4 of this Act contains phraseology substantially identical to that language in the regulations which appellant has placed in dispute, this Board will weigh appellant's arguments as to the language in the regulations just as they would apply to the language in the Act, specifically in section 4.

The meaning of "are within" from the first sentence of section 4 of the Act, and "are not within" from the second is brought into question by appellant's arguments. The proper application of these words to the circumstances of post-application, pre-lease issuance KGRA determination is a question of first impression for this Board in the geothermal leasing context, but the analogy to the identical issue in the subject area of oil and gas leas-

[5] 43 CFR 3210.1(b):
"Lands and deposits subject to disposition under this part which are not within any KGRA will be available for leasing after the effective date of these regulations. * * *"

ing is so compelling, for the reasons given below, that this Board is of the opinion that the Congress, in enacting the Geothermal Steam Act in its present form, intended for the rule applied in oil and gas matters to be followed in geothermal leasing.

Section 2 of the Mineral Leasing Act Revision of 1960, 74 Stat. 781, amended sections 17, 17(a) and 17 (b) of the Mineral Leasing Act of February 25, 1920, *as amended*, to state that:

> Sec. 17(a) * * *
>
> (b) If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations * * *.
>
> (c) If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *

30 U.S.C. § 226 (1970).

The language employed in section 4 of the Geothermal Steam Act is for all material purposes, except one which is discussed below, similar to the above language from the Mineral Leasing Act. Further, in its report on the Geothermal Steam Act, the House Interior and Insular Affairs Committee specifically analogized the Geothermal Steam Act to the Mineral Leasing Act, saying that:

> [This bill] provides statutory authority for the Secretary of the Interior to issue leases for the development of geothermal steam and the associated geothermal steam resources underlying the public lands in much the same manner as he is now authorized to lease land for the development of their oil and gas deposits under the Mineral Leasing Act of 1920, as amended.[6]

The close similarity between section 4 of the Geothermal Steam Act and subsections 17(b) and 17(c) of the Mineral Leasing Act seems well established.

In enacting the Geothermal Steam Act the Congress must have been aware of the construction which the Department of the Interior in an interpretative rule, *Solicitor's Opinion*, 74 I.D. 285 (1967), had given to the language of 17(b) of the Mineral Leasing Act when implementing that part of that statute. The Solicitor declared that lands may not be leased noncompetitively if they become included within the known geologic structure of a producing oil or gas field before the lease is actually issued, even though such lands had not been deemed to have been within the structure at the time of the filing of the lease application. This rule is now codified into regulation at 43 CFR 3110.1–8, *Minetta A. Miller*, 17 IBLA 245 (1974); *Geral Beveridge*, 14 IBLA 351, 81 I.D. 80 (1974); *Robert B. Ferguson*, 9 IBLA 275 (1973); *James W. McDade*, 3 IBLA 226 (1971), *aff'd.*, *McDade* v. *Morton*, 494 F.2d 1156 (D.C. Cir. 1974).

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[6] H. R. Rep. No. 1544, 91st Cong., 2d Sess., 3 *U.S. Code Cong. and Admin. News*, p. 5116.

[3] In light of the above, this Board holds that section 4 of the Geothermal Steam Act directs competitive bidding for geothermal leases on lands which are determined to be within a KGRA before the issuance of any noncompetitive geothermal leases on the lands in issue, even though the KGRA determination is made after the pertinent application is filed. Thus, we affirm the rejections of appellant's applications.

In support of this conclusion, the District Court for the District of Columbia, faced in *McDade*, *supra*, with a post-application, pre-issuance determination that certain lands were within a known geologic structure in the oil and gas leasing context, held that:

> The unambiguous language of the Mineral Leasing Act states that leases for land within a known geologic structure of an oil or gas field *shall* be leased by *competitive* bidding. The logical and sensible regulatory result under such wording is to preclude any type of leasing other than by means of competitive bidding *whenever* it becomes apparent that the applied for leases involve lands within a known geologic structure. * * * (Italics in original.)

353 F. Supp. at 1013.

A qualification expressed in section 17(b) of the Mineral Leasing Act, but not in section 4 of the Geothermal Steam Act, is the requirement that before competitive bidding shall be applicable, the known geologic structure must include a *producing* oil or gas field. This difference, however, does not distinguish the meaning of the phrases "are within" and "are not within" as used in section 4 of the Geothermal Steam Act from that of the identical usage in subsections 17(b) and (c) of the Mineral Leasing Act. The Department's rule, *Solicitor's Opinion*, *supra*, and the holding in *McDade* both specifically reject the theory that a lease applicant has any vested rights in the lands applied for, and this Board hereby applies the same rule to geothermal lease applications. We can see no suggestion from the language in section 4 of the Geothermal Steam Act that any more rights are created in an applicant under section 4 than are given by the language of sections 17(b) and (c) of the Mineral Leasing Act.

[4] Likewise, there is no suggestion in section 4, or elsewhere, of the Geothermal Steam Act of an exemption from competitive bidding for those lands which were applied for during the initial 30-day filing period. Thus, we hold that the competitive bidding requirements of the first sentence of section 4 apply to those applications filed during the January 1974 filing period, and that the State Office rejections of appellant's noncompetitive lease applications which were filed during that period were proper under 43 CFR 3210.4.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decisions appealed from are affirmed as modified.

DOUGLAS E. HENRIQUES,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

NEWTON FRISHBERG,
Chief Administrative Judge.

APPEAL OF COAC, INC.

IBCA-1004-9-73

Decided *February 19, 1975*

Contract No. 4907B10090, Yosemite National Park, D52 (CD) CSD, National Park Service.

Denied.

1. Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration—Rules of Practice: Appeals: Statement of Reasons

A contractor's petition to reopen and conduct an evidentiary hearing after an adverse decision of its appeal, which was decided on the record without an oral hearing, was denied where the petition, treated as a motion for reconsideration, not only failed to satisfy the newly discovered evidence rule but also failed to disclose the evidence which would be proffered at the hearing and thus furnished no reason for vacating the original decision.

APPEARANCES: Robert N. Katz, Attorney at Law, Berkeley, California, for appellant; Ralph A. Canaday, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE NISSEN

INTERIOR BOARD OF CONTRACT APPEALS

On December 31, 1974, the Board received from counsel for the appellant an undated letter with its enclosure an undated "Petition to Reopen and Conduct Evidentiary Hearing" with respect to our decision of December 6, 1974, 81 I.D. 700, 74-2 BCA par. 10,982.

The letter alleges that since the Government's submission in response to the Board's order setting the time in which the parties might supplement the record was not received by counsel for the appellant until approximately December 1, appellant's request for an additional submission and an evidentiary hearing are not untimely. The letter also asserts that a request for an extension or continuance would have been appropriate due to the extended hospitalization of a member of the immediate family of counsel for appellant. As it is brief, the body of the petition will be quoted in full:

> Appellant herein respectfully moves that the reference matter be reopened and an evidentiary hearing be conducted. Counsel for appellant received government (sic) additional submission on or about the 30th day of November, 1974. Until counsel had received said additional submission, it was not clear whether or not a submission by appellant would be appropriate.
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> In the decision rendered on December 6, 1974, the Board appropriately indicates that certain testimony and evidence is lacking in the record. This testi-

mony and evidence is readily available for presentation at any evidentiary hearing. Furthermore, failure to grant this request would be arbitrary and capricious in view of the justified reasons for delay in requesting said evidentiary hearing, and granting hereof would not be prejudicial to substantive rights of the parties hereto. Accordingly, it is respectively (sic) requested that this matter be reopened, that an evidentiary hearing be conducted, and that appellant be afforded an opportunity to submit an additional submission for the record and a post-hearing brief.

Not unexpectedly, the Government opposed the Petition, asserting, *inter alia*, that it would be prejudicial to the Government to allow appellant to try the case after the Board has stated the legal grounds upon which the appeal should have been prosecuted and listed evidence, lacking in the record, required to support the appeal. The Government has submitted a chronology detailing the over eight months which elapsed between docketing of the appeal and filing of the complaint[1] and points out that the Board's order settling the record contemplated simultaneous submissions by the parties of additional documents or exhibits for inclusion in the record. Appellant has not responded to the Government's opposition to the Petition to Reopen nor amplified in any way its reasons in support of reopening the record.

Section 4.109 of the Board's rules, entitled "Hearing—election," provides in part: "Within 15 days after the Government's answer has been served upon the appellant, or within 20 days of the date upon which the Board enters a general denial on behalf of the Government, notification as to whether one or both of the parties desire an oral hearing on the appeal should be given to the Board. * * * A party failing to elect an oral hearing within the time limitations specified in this section may be deemed to have submitted its case on the record."

The Government's answer to the complaint was received by the Board on July 15, 1974. By an order, dated September 5, 1974, received by appellant on September 14, 1974, the Board pointed out that since neither party had requested a hearing, the appeal was deemed submitted for decision on the record. The parties were informed that the appeal would be considered ready for decision on October 7, 1974, and given until that date to supplement the record with additional documents or exhibits and to file briefs. Pursuant to the request of Department counsel, the Board by an order, dated September 20, 1974, extended the time for supplementing the record to and including November 6, 1974. This order was received by appellant on September 23, and by appellant's counsel on September 27, 1974. At no time prior to receipt of the instant Petition has appellant indicated that it desired a hearing.

[1] The notice of appeal was received by the Board on September 25 and the docketing notice was received by appellant's counsel on September 28, 1973. Appellant's complaint, dated June 12, 1974, was received by the Board on June 18, 1974.

Section 4.125 of the Board's rules is entitled "Motions for reconsideration," and provides in part: * * * "Reconsideration of a decision, which may include a hearing or rehearing, may be granted if, in the judgment of the Board, sufficient reason therefor appears."

Decision

We treat the "Petition to Reopen" as a motion for reconsideration.[2] This Board has traditionally denied motions for reconsideration which do not allege newly discovered evidence and which merely repeat arguments which were fully considered in the original opinion.[3] We have also held that a motion for reconsideration is not a proper vehicle for correcting procedural errors or omissions by a party in the presentation of his case.[4]

We have granted an appellant's motion for reconsideration and its request for an oral hearing after an initial decision on the record, where counsel for the appellant alleged that he had deferred a decision on requesting a hearing pending Government action on a second appeal under the same contract and the fact was that the contracting agency had delayed over 16 months in forwarding the second appeal.[5] No such unusual circumstance has been shown here.[6]

[1] Even if we were to abandon the rule concerning newly discovered evidence, the losing party should not lightly be given a second opportunity to prove his case.[7] Appellant here has not shown that it is entitled to relief under any of the existing precedents.[8]

The "Petition to Reopen and Conduct Evidentiary Hearing," treated as a motion for reconsideration, is denied.

SPENCER T. NISSEN,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

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[2] *Cf. Obrisco Electronics, Inc.*, ASBCA Nos. 18533 and 19071 (November 15, 1974), 74-2 BCA par. 10,983 (letter stating detailed complaint would be forthcoming treated as a motion for reconsideration).

[3] *South Portland Engine Company, Inc.*, IBCA-807-10-69 (July 23, 1971), 71-2 BCA par. 8977.

[4] *South Portland Engineering Company*, IBCA-771-4-69 (January 29, 1970), 70-1 BCA par. 8092.

[5] *J & B Construction Company, Inc.*, IBCA-667-9-67 and IBCA-767-3-69 (April 17, 1970), 70-1 BCA par. 8240.

[6] If extended hospitalization of a member of counsel's immediate family affected the handling of the case, the matter should have been brought to the Board's attention before the record was closed by letter, telegram or telephone.

[7] *Madison Park Clothes, Inc.*, ASBCA No. 4234 (May 11, 1961), 61-1 BCA par. 3054. *Cf. Southland Manufacturing Corporation*, ASBCA No. 10519 and 12500 (June 5, 1969), 69-1 BCA par. 7714, on reconsideration (October 22, 1969), 69-2 BCA par. 7968 and *Turner Construction Company*, GSBCA No. 3549 (November 7, 1974), 74-2 BCA par. 10,934.

[8] These as a minimum have required a showing that additional evidence would likely produce a different result. *Southland Manufacturing Company*, note 7, supra, and cases cited.

UNITED STATES
v.
CLARION W. TAYLOR, SR., AND GERALD O'CONNOR

19 IBLA 9
Decided *February 20, 1975*

Appeals from the decision of Administrative Law Judge Robert W. Mesch dismissing the contest complaint against the Ute Park No. 1 placer claim in Colorado Contest 499.

Reversed.

1. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Determination of Validity—Mining Claims: Discovery: Marketability—Surface Resources Act: Generally

The Surface Resources Act of July 23, 1955, declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter.

2. Mining Claims: Discovery: Marketability

The marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit.

3. Administrative Procedure: Administrative Law Judges—Contests and Protests: Generally—Mining Claims: Hearings—Rules of Practices: Hearings

While a mining contest is within the jurisdiction of an Administrative Law Judge, he may reopen the hearing for the production of further evidence before he makes his decision.

4. Contests and Protests: Generally—Evidence: Burden of Proof—Mining Claims: Contests—Rules of Practice: Evidence—Rules of Practice: Government Contests

The ultimate burden of proof to show a discovery of a valuable mineral deposit is always upon the mining claimant. However, if the Government in a mining contest fails to present a prima facie case and the contestees move to dismiss the case and rest, the contest complaint must be dismissed because there would be no evidentiary basis for an order of invalidity.

5. Evidence: Generally — Mining Claims: Contests—Mining Claims: Hearings—Rules of Practice: Evidence—Rules of Practice: Government Contests

In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered; therefore, if evidence presented by the contestees shows that there has not been a discovery, it may be used in reaching a decision that the claim is invalid because of a lack of discovery, regardless of any defects in the Government's prima facie case.

6. Evidence: Burden of Proof—Mining Claims: Contests—Rules of Practice: Evidence—Rules of Practice: Government Contests

Where the Government has made a prima facie case of lack of discovery in a mining contest, any issue in doubt as to discovery raised by the evidence must be

resolved against the party having the risk of nonpersuasion, the mining claimant. If a mining claimant fails to show by a preponderance of the evidence as to such issue that there has been a discovery of a valuable mineral deposit he has not satisfied his burden of proof and an Administrative Law Judge must declare the claim invalid, rather than leave the question of the claim's validity unresolved.

7. Administrative Procedure: Hearings—Contests and Protests: Generally—Mining Claims: Contests—Mining Claims: Determination of Validity—Mining Claims: Hearings—Rules of Practice: Government Contests

Where a contestee in a mining contest preponderates sufficiently to overcome the Government's prima facie case on an issue raised by the evidence in a mining contest and there is no evidence on other essential disputed issues, the contest should be dismissed unless a patent application is being contested, in which case a further hearing must be ordered to resolve other essential issues to determine whether the application may be allowed.

8. Evidence: Burden of Proof—Mining Claims: Discovery: Marketability

In making a prima facie case in a mining contest involving a common variety of material, it is only essential for the Government to establish that the contestees had not prior to July 23, 1955, met the criteria used in determining marketability at a profit. It is not essential that the Government's evidence prove conclusively that the material could not, in fact, be marketed at a profit, but only that it was not sold or marketed. The Government is not required to do the discovery work upon a mining claim; it is only necessary that the exposed areas of a claim and the workings on a claim be examined to verify if a discovery has been made by the mining claimant.

9. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Marketability

In determining the marketability of a common variety of sand and gravel from a mining claim, the possibility that the material could be sold for purposes for which ordinary earth may be used may not be considered, as such purposes are not validating uses cognizable under the mining laws.

10. Mining Claims: Common Varieties of Minerals: Generally—Mining Claims: Discovery: Marketability

A mining claim located for a common variety of gravel prior to the Surface Resources Act of July 23, 1955, cannot be sustained as being held as a reserve for the gravel deposit where the claimants had not established a discovery under the marketability test at that time. The "reserve rule" is not a substitute for discovery. A mining claimant's desire to hold a claim in hope that there will be an increase in the market demand and price does not satisfy the marketability test.

11. Evidence: Credibility — Mining Claims: Discovery: Marketability

A conjectural opinion on the possibility of a mining claimant's ability to market a common variety of gravel at a profit prior to July 23, 1955, is not credible evidence of marketability where specific evidence tends to show that development of a mining operation at that time was not then warranted by the marketplace conditions.

APPEARANCES: Michael J. Frederick, Esq., of Ross and Frederick, Colorado Springs, Colorado, for appellant-contestees; Rogers N. Robinson, Esq., Office of General Counsel,

Department of Agriculture, Denver, Colorado, for appellant-contestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

The Bureau of Land Management, acting at the request of the Forest Service, Department of Agriculture, filed a contest complaint against the contestees' Ute Park No. 1 and Ute Park No. 2 placer mining claims, located in section 9, T. 13 S., R. 68 W., 6th P.M., about eight miles northwest of Colorado Springs in Pike National Forest, Colorado. The complaint, as amended, alleged: (1) that no valuable mineral deposits have been discovered on the claims; (2) that the lands are non-mineral in character; and (3) that the material on the claims is a common variety of rock within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 *et seq.* (1970).

Following the filing of an answer to the complaint, a hearing was held on June 6, 1973. Administrative Law Judge Mesch issued his decision of November 28, 1973, declaring the Ute Park No. 2 claim null and void, but dismissing the complaint against the Ute Park No. 1 claim, although he failed to find that the claim was valid. The contestees have not appealed the Judge's finding that the Ute Park No. 2 claim is invalid. Therefore, the decision became final as to that claim. However, both the contestant and contestees have appealed from the Judge's refusal to make a finding on the validity of the Ute Park No. 1 claim as to discovery of a valuable mineral deposit. Both contend basically that although the Judge correctly stated applicable standards to determine discovery, his application of the law to the facts was incorrect.

[1] Contestees concede that the material for which the Ute Park No. 1 claim is allegedly valuable, a gravel, is a common variety of gravel. The claim was located on April 4, 1955 (Tr. 47). This was prior to the Surface Resources Act of July 23, 1955. Section 3 of that Act, 30 U.S.C. § 611 (1970), declared that common varieties of sand and gravel and certain other materials are not valuable mineral deposits under the mining laws (30 U.S.C. § 22 *et seq.* (1970)); *Coleman* v. *United States*, 390 U.S. 599 (1968). In order for a mining claim for a common variety of sand or gravel located prior to the Act of July 23, 1955, to be sustained as a claim validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the time of the Act, *Barrows* v. *Hickel*, 447 F.2d 80, 82 (9th Cir. 1971); *Palmer* v. *Dredge Corp.* 398 F.2d 791, 795 (9th Cir. 1968), *cert. denied*, 393 U.S. 1066 (1969), and reasonably continuously thereafter. *State of California* v. *Doria Mining & Engineering Corp.*, 17 IBLA 380 (1974).

[2] The prudent man test requires that there must be a showing of minerals in sufficient qauntity that:

> * * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. *Womble*, 19 L.D. 455, 457 (1894), *approved in Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905). Especially as to materials in common abundance as sand and gravel, this Department has long required special evidence in addition to a showing of a quantity of mineralization. Thus, it was stated in an Acting Solicitor's Opinion, 54 I.D. 294, 296 (1933):

> * * * [T]he mineral locator or applicant, to justify his possession, must show that by reason of accessibility, *bona fides* in development, proximity to market, existence of present demand, and other factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. * * *

These additional criteria—the marketability at a profit test—were approved in *Foster* v. *Seaton*, 271 F. 2d 836, 838 (D.C. Cir. 1959), and recognized in *Verrue* v. *United States*, 457 F.2d 1202 (9th Cir. 1972). The marketability test is a refinement of the prudent man test. *Coleman* v. *United States*, *supra* at 603.

The contentions by the contestant and the contestees go to the vital question of whether the prudent man-marketability test was met as of July 23, 1955, and thereafter. Both object to the Judge's refusal to make a finding on whether the Ute Park No. 1 claim is valid because of a discovery or invalid because of lack of a discovery. The Judge recognized that proof of nondevelopment and a lack of sales from a mining claim before July 23, 1955, give rise to a presumption that the material from the claim was not marketable at a profit at that time, and held that the Government had established a prima facie case of nondiscovery of a valuable mineral deposit by applying this presumption, *citing United States* v. *Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971), *aff'd per curiam*, No. 72–2396, 9th Cir., October 9, 1974; *rehearing denied* January 13, 1975; *United States* v. *Humboldt Placer Mining Co.*, 8 IBLA 407, 79 I.D. 709 (1972), *appeal pending*, Civ. No. S–2755, D. Cal.; *United States* v. *Harenberg*, 11 IBLA 153 (1973); *United States* v. *Block*, 12 IBLA 393 (1973). Nevertheless, he also ruled that the Government had failed to make a prima facie case as to the quantity and quality of the gravel upon the claim. He also indicated that opinion testimony of contestees' witness, Frank Washam, who had been in the sand and gravel business from 1952 to 1972, that the contestees could have marketed the material from the claims, negated the prima facie case. He concluded, however, that the contestees had not presented:

> * * * sufficiently detailed evidence to support the conclusion that a person of ordinary prudence would have been justi-

fied in working the property prior to July 23, 1955, with a reasonable prospect of success in developing a valuable mine. A reasonable prudent person would certainly have to have more information than that presented by the contestees in order to reach a rational decision as to whether the market and other factors were such as to warrant the development of the property. The state of the record is such that no reasonable conclusion can be reached either way on the question of whether a valid discovery of a valuable mineral deposit was made on the Ute Park No. 1 claim prior to July 23, 1955.

He dismissed the contest complaint but refused to rule that the claim was valid by reason of a discovery.

The contestees assert generally that the evidence was sufficient to find that the claim was and is valid because of a discovery, and that they are entitled to a ruling to that effect. In the alternative, they request an affirmance of the Judge's decision to the extent he found they presented adequate evidence to rebut the Government's prima facie case, even though they recognize the Government could bring another contest against the claim. The contestant, on the other hand, contends generally that the Judge erred in ruling that the Government failed to make a prima facie case in certain respects, in ruling that contestees' evidence was sufficient to negate the prima facie case and, in any event, in refusing to make a ruling one way or the other on whether the claim was validated by a discovery.

Where a record is unsatisfactory on the basic issue of discovery-marketability, this Board in a few circumstances has ordered a further hearing in order to make an informed determination; *e.g.*, *United States* v. *Ideal Cement Co.*, 5 IBLA 235, 79 I.D. 117 (1972), *appeal pending*, *Ideal Basic Industries, Inc.* v. *Morton*, Civ. No J–12–72, D. Alas.; *United States* v. *Kosanke Sand Corp.* (*On Reconsideration*), 12 IBLA 282, 80 I.D. 538 (1973); *United States* v. *Wells*, 11 IBLA 253 (1973). *See also United States* v. *DeZan*, A–30515 (July 1, 1968).

[3] While a case is still within the jurisdiction of an Administrative Law Judge, it is within his authority also to reopen a hearing for the production of further evidence before he makes his decision in the matter. *See Isbrandtsen Co., Inc.* v. *United States*, 96 F. Supp. 883, 892 (S.D. N.Y. 1951), *aff'd per curiam*, 342 U.S. 950 (1952); *United States* v. *King*, A–30867 (February 28, 1968). This discretionary authority, however, should be exercised carefully so that a case is not drawn on beyond reasonable lengths of time, and so that the parties are not required to go to unreasonable efforts in presenting their cases. There should also be a reasonable basis for concluding that a further hearing will be productive of the desired additional information before reopening the evidentiary proceedings. *Cf. United States* v. *Haas*, A–30654 (February 16, 1967); *United States* v. *Riesing*, A–30474 (January 18, 1966).

The Judge did not order a further hearing in this case, although he found the evidence unsatisfactory on the discovery issue. Neither

party has requested a further hearing nor has made an offer of proof of additional evidence. On the contrary, both have requested that a ruling be made one way or the other on the unresolved issue. Therefore, we shall not, on our own accord, order a further hearing.

[4] The Judge's action in failing to rule on the discovery issue raises questions relating to the burden of proof in a Government contest. By locating a mining claim and alleging a discovery of a valuable mineral deposit therein, a mining claimant is asserting a superior right and title to the land over the United States. He is the true proponent of a rule or order that he has complied with the mining laws entitling him to possession of the claim. Consequently, the ultimate burden of proving discovery is always upon the mining claimant. *United States* v. *Springer*, 491 F. 2d 239, 242 (9th Cir 1974), *cert. denied*, 419 U.S. 834, 95 S. Ct. 60 (1974); *Foster* v. *Seaton*, *supra*. When the Government contests the claim it has only the burden of going forward with sufficient evidence to make a prima facie case of lack of discovery and then the affirmative burden of disproving the Government's case by a preponderance of the evidence devolves upon the claimant. *Id.* We shall point out the consequences of the burden of proof in certain situations and the duty of the Judge, or this Board, in such circumstances.

If the Government fails to present a prima facie case, a contestee by timely motion may move to have the case dismissed and then rest. The contest complaint would then properly be dismissed because there was no prima facie case making an evidentiary basis for an order of invalidity by lack of discovery, and no other evidence in the record to support the charges in the complaint. *Cf. United States* v. *Winters*, 2 IBLA 329, 339–40, 78 I.D. 193, 197 (1971).

[5] If, however, the contestees go forward, even after filing a motion to dismiss, and present their evidence, that evidence must be considered as part of the entire evidentiary record and weighed in accordance with its probative values. Therefore, even if the Government has failed to make a satisfactory prima facie case, or if its case is weak, evidence presented by contestees which supports the Government's contest charges may be used against the contestees, regardless of the defects in the Government's case. *United States* v. *Melluzzo*, 76 I.D. 181, 188 (1969),[1] *United States* v. *Foster*, 65 I.D. 1, 11 (1958), *aff'd*, *Foster* v. *Seaton*, *supra*.

[6] Where evidence has been presented on an issue and the Judge does not order a further hearing to resolve factual uncertainties on that issue, those uncertainties, or doubts, must be resolved against the party having the ultimate burden of proof on the issue, the party bearing the

[1] Set aside for other reasons, *Frank Melluzzo*, 1 IBLA 37 (1970).

risk of nonpersuasion. Thus, if the party having the risk of nonpersuasion does not present sufficient evidence to sustain his burden, he must suffer the consequences of his failure; namely, a ruling against him on the issue upon which there is doubt. *See Marcum* v. *United States*, 452 F. 2d 36 (5th Cir. 1971); *Johnson* v. *Barton*, 251 F. Supp. 474 (W.D. Va. 1966). The application of the burden of proof is to forestall unresolved decisions where evidence has been presented but there are doubts or uncertainties remaining. Therefore, where the Government has made a prima facie case of lack of discovery, any doubt on the issue of discovery raised by the evidence must be resolved against the mining claimant, who bears the risk of nonpersuasion. The Administrative Law Judge has a duty to make findings of fact and conclusions of law on the factual and legal issues raised in a contest. *See* 5 U.S.C. §§ 556(c)(8), 557 (1970). Where the claimant has failed to meet his burden of proof on discovery, the Judge must find that there has not been a discovery. *Foster* v. *Seaton*, *supra*. Such a finding impels the conclusion that the claim is invalid, as discovery is a *sine qua non* of a claim's validity.

[7] Where, however, the contestees' evidence preponderates sufficiently to overcome the Government's prima facie case on an issue raised by the evidence, the contest should be dismissed and a ruling on the issue made by the Judge. For example, if the Government's prima facie case consisted of evidence that a common variety of material was not marketable as of July 23, 1955, and the contestees' evidence preponderated that it was marketable then, the Judge should so rule and dismiss the contest where there is no evidence as to present marketability of the material. The issue of present marketability not having been raised by the evidence could not be decided, but there would be a ruling that would establish that a prerequisite to the claim's validity, *i.e.*, marketability as of the cutoff date of July 23, 1955, was met.

The foregoing paragraph assumes that a patent application has not been filed. If a patent application has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before patent may issue. If there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron* v. *United States*, 252 U.S. 450, 460 (1920). Therefore, in a patent proceeding, it would be essential to order a further hearing to make a proper determination on the essential issues.

In the case at hand, the Judge concluded that a prima facie case had been presented that the material from the claim was not marketable in 1955, because of the presumption arising from lack of development

and sales of material from the claim. The affirmative burden was thus upon the contestees to show that the material was marketable at a profit in 1955. We agree with both parties that in the circumstances of this case the Judge should have ruled on the discovery-marketability issue. He found that the state of the record is such that no reasonable conclusion can be reached either way on the question of marketability prior to July 23, 1955. This issue must be resolved. The Judge erred by not invoking the consequences of the contestees' failure to sustain their burden of proof—risk of nonpersuasion—once he found the evidence in equipoise, and that there was insufficient evidence to establish marketability. His decision is subject to reversal because of this error alone.[2] We also note that he erred in statements to the effect it was unnecessary to consider the contestees' evidence on quantity and quality of the material because the Government did not make a prima facie case that the material was not of sufficient quantity and quality, as all evidence in the record going to matters in issue relative to the discovery test must be considered. *Id.*

We shall now consider contestees' contention that the claim is valid because the evidence satisfactorily shows a discovery, and related issues raised by both parties.

Much of the Judge's decision criticized the Government's prima facie case. Some of this criticism is misplaced because it would place an impossible burden upon the Government to present evidence to negate all possible aspects of the marketability-discovery test. If the Government showed that one essential criterion of the test was not met, this was sufficient to establish a prima facie case. Such evidence was presented here. The mining engineer witness for the Government in this case testified concerning his examinations of the claim in 1969, 1970, and in 1971 (Tr. 9, 14–17). He observed there had been no removal of materials from the claim other than minor amounts which he believed due to assessment work (Tr. 15). He indicated the only workings on the claim were made around 1969 and in 1972. He met with the contestees and discussed whether they had satisfactorily established a market prior to July 23, 1955 (Tr. 17). He offered his opinon, based upon his examinations of the claim and discussions with the claimants, that

[2] The consequence of the failure of the claimant to satisfy his burden of proof is akin to the determination made in *United States* v. *Carlile*, 67 I.D. 417, 427 (1960), that:

"[W]here in a contest against a mining claim it is found that a valid discovery has not been made, it necessarily follows that the claim is invalid, or null and void, without regard to whether the contest was brought as the result of an application for patent or in the absence of an application for patent. * * *" This position has been restated by this Board, *United States* v. *Bartels*, 6 IBLA 124 (1972). While *Carlile* dealt explicitly with the form of the order to be issued after a contest hearing and the legal consequence of a finding of no discovery, it clearly demonstrates that when it is determined a discovery has not been made the claim must be declared null and void and connot be suspended in a legal limbo.

a prudent man would not be justified in spending time and money in the hopes of developing a valuable mine because a market was not established prior to July 23, 1955 (Tr. 19).

The Government's expert witness' opinion was based upon an adequate investigation of the claim. It is supportable, and sufficient to establish a prima facie case that there was no discovery. *United States* v. *Winters*, *supra*.

[8] To emphasize, in making a prima facie case, it was only essential for the mineral examiner to establish that the claimant had not prior to July 23, 1955, in fact, met the criteria used in determining marketability. It is not essential that the testimony prove conclusively that the material could not be marketed at a profit. The examiner's failure to testify about specific prices, costs, and certain other aspects of the marketplace at that time would be harmful to the Government's case only if such information was essential in order to rebut the contestees' showing of marketability. If the contestees fail to show that the criteria of the marketability test have been satisfied before the critical time and thereafter, it would not be essential to show more specific evidence as to the market conditions.[3] Also, it is not a Government mineral examiner who is required to do the discovery work upon a claim. *United States* v. *Coston*, A-30835 (February 23, 1968). It is only necessary that he examine the exposed areas of a claim and the workings on a claim to verify if a discovery has been made by a mining claimant. *United States* v. *McGuire*, 4 IBLA 307 (1972); *United States* v. *Laing*, 3 IBLA 108 (1971); *United States* v. *Gould*, A-30990 (May 7, 1969); *United States* v. *Smith*, A-30888 (March 29, 1968); *United States* v. *Swain*, A-30926 (December 30, 1968).

Furthermore, it is evident from the mineral examiner's testimony that there had been no material sold from the claim prior to July 23, 1955, nor since that time. The evidence also showed there had been no development of the claim. These facts raise the presumption that the material was not marketable. *Osborne* v. *Hammit*, 377 F. Supp. 977 (D. Nev. 1964).

Appellants contend, however, that their evidence overrides this presumption. Their evidence shows the following: only some spade work had been done on the claim at the time of location (Tr. 60); and no drill tests were made until 1958 (Tr. 56), which tests would be necessary in order to ascertain whether there was sufficient quantity of the mate-

[3] This is not to say that the Government could not introduce such evidence in making a prima facie case, or in rebuttal. Indeed, a stronger case would be made by doing so. Three cases illustrate the risks in the Government's failure to present specific rebuttal evidence regarding marketplace conditions where contestees offered opinion and other evidence on marketability: *Verrue* v. *United States*, 457 F.2d 1202 (9th Cir. 1972); *United States* v. *Gibbs*, 13 IBLA 382 (1973); *United States* v. *Harenberg*, 9 IBLA 77 (1973). *But compare* these with *United States* v. *Block*, 12 IBLA 393 (1973).

rial on the claim to develop a mine. (See testimony by contestees' engineer, Tr. 71–76.) Also, claimant's engineer estimated there were 2½ million yards of gravel on the claim, but this estimate was based upon the drill test data obtained from 1958 to 1965 (Tr. 73, Ex. A). Contestee Gerald O'Connor testified that he signed a lease in May of 1955 with a representative of two construction firms for sand and gravel at a royalty of 7½ cents per ton, with a guaranteed minimum of $2,500 per year (Tr. 48–49). The lessee, however, never paid any money, never did any work on the claims, did not remove any material therefrom, and after two years the lease was terminated (Tr. 50). A copy of the lease was not introduced into evidence (Tr. 49) and, therefore, all of the obligations of the parties to the lease are unknown.

O'Connor testified that in 1955 he was not familiar with the price of common variety of rocks and therefore felt the 7½ cents a ton provided by the lease was satisfactory but later figured it was too cheap (Tr. 64). Although he offered a general opinion that he probably could have sold gravel from the claim at a profit, his entire testimony destroys this broad conjecture. Rather, it supports the conclusion that the local market was too spotty and too irregular to support a sand and gravel operation. He turned down an offer around 1955 because the price was too low (Tr. 52, 54), and did not develop other local market potentials because the possible sales would be too discontinuous and small to allow for steady production and a realistic profit (Tr. 64, 67–68).

[9] Also, the testimony indicates that much of this sporadic market was for use of the material as fill, base and landscaping, which the Department has held not to be validating uses. *United States* v. *Bienick*, 14 IBLA 290 (1974); *United States* v. *Kottinger*, 14 IBLA 10, 16–17 (1973); *United States* v. *Barrows*, 76 I.D. 299, 306 (1969), *aff'd*, *Barrows* v. *Hickel*, 447 F.2d 80 (9th Cir. 1971); *United States* v. *Hinde*, A–30634 (July 9, 1968).

O'Connor was not in 1955 or thereafter in the sand and gravel business; he runs a service station (Tr. 56). The essence of his testimony as to why he did nothing further with the claim is that he wanted to wait and hold the material until it could be sold at a higher price, believing that inflation would increase and that the nearby City of Colorado Springs would grow and increase the demand (Tr. 67–68). This same rationale was given by another witness for contestees, Mr. Frank Washam, who had been in the sand and gravel business from 1950 to 1972. He also gave a broad opinion that the material could have been marketed at a profit in 1955. However, his more specific testimony shows that this is a very optimistic opinion. Indeed, he indicated he would not have operated from the

claims at that time because he had sources nearer to Colorado Springs. He indicated that there were no substantial pits in operation in the area of the claims in 1955, that small users could get their supply from road cuts in the area, and that in 1956 there were only two large pits near the city of Colorado Springs (Tr. 86). His testimony supports a conclusion that the market demand for material has increased recently as gravel pits near Colorado Springs have become exhausted and also because of the growth of that city and mountain communities near the claim (Tr. 94, 100). From his testimony it is apparent that because of the increased costs for hauling the material, the contestees could not have successfully competed in the larger Colorado Springs market area until closer sources were exhausted (Tr. 89, 95).

Although Mr. Washam gave his opinion that the contestees could have sold an average of 500,000 tons of material a year from 1955 to 1965 (Tr. 90), the support for this opinion is lacking. In making this opinion, also, he did not distinguish between uses of the materials recognized under the mining laws before 1955 and other uses. The possibility that material could be sold for purposes which ordinary earth may be used, such as fill, may not be considered in determining the marketability of a common variety of sand and gravel because such purposes were not validating uses recognizable under the mining laws even prior to the Surface Resources Act. *United States* v. *Barrows*, *supra*; *United States* v. *Bienick*, *supra*.

Contestees contend that their evidence meets all of the criteria of the marketability test set forth in *United States* v. *Harenberg*, 9 IBLA 77 (1973), and *United States* v. *Gibbs*, 13 IBLA 382 (1973), where there had been development on other nearby or adjoining claims, but no development on the particular claims involved. They contend that in those cases witnesses of the claimants stated they were holding the materials in reserve for reasons that had nothing to do with marketability but, rather, concerned their own lack of "economic necessity" to develop the claims. They contend that as O'Connor was running a service station, he had no financial need to develop this claim and the same rationale should be applicable here. They also assert that although Rocky Mountain Paving Company, Washam's company, was satisfying the market need at the time, this indicates there was a market demand and the fact it was being well supplied by others does not matter under the *Gibbs* rationale.

We must reject these contentions. We need not examine the rationale in those cases because, despite the broad dictum in *Gibbs* and *Harenberg*, the facts of those cases are distinguishable from those here. Furthermore, the implication drawn by contestees that the criteria of *bona fides* in development and present demand for the material from the claim are no longer necessary

since *Harenberg*, *Gibbs*, and also *Verrue* v. *United States*, *supra*, is not true. The Department in *Harenberg* and *Gibbs*, and the Court in *Verrue*, recognized the marketability standards and burden of proof set forth in *Foster* v. *Seaton*, *supra*. As they did not purport to change the standards, none of the marketability standards and burden of proof requirements have been changed. Those standards and requirements are well-founded.

Of particular interest on the issues of present specific demand for the material from the claim and *bona fides* in development is the most recent pronouncement of the United States Court of Appeals for the Ninth Circuit in *Clear Gravel Enterprises, Inc.* v. *Nolan Keil et al.*, No. 72-2396 (filed October 9, 1974), *aff'g*, *United States* v. *Clear Gravel Enterprises, Inc.*, 2 IBLA 285 (1971). The Court in *Clear Gravel* at 2 and 3 stated with respect to sand and gravel claims:

> While the marketability of the mineral could have been demonstrated by the Appellant by a showing of its accessibility, its proximity to the market, *the demand for it and by the Appellant's bona fide efforts to develop the claims and compete in the market with the product extracted from those claims*, nonetheless, the record demonstrates that Appellant's evidence fell far short of *the required showing*. Instead, the evidence indicates that although Appellant had between 1952 and no later than 1956 leased all sixteen claims to the second largest sand and gravel-producing company in the area, that company had mined but one of those claims, and the one being mined was neither of the two claims here involved. Other evidence produced at the time of the hearing before the Hearings Examiner further demonstrated that the one mine being operated provided sufficient sand and gravel to meet the needs of the market and that it could yield a sufficient quantity of sand and gravel to provide for any increased share of the market to its producer.
>
> A government geologist testified that he had inspected the claims and that in his opinion, the sand and gravel could not be extracted, removed and marketed at a profit as of July 23, 1955. A government valuation engineer examined the claims, and because a 1955 market had not been demonstrated for the materials on the claims, he, too, reached the same conclusion as the geologist.
>
> Of particular significance is the obvious fact appearing from the record that the quantity of Appellant's other sand and gravel holdings in the area, when combined with the state of the market, were such as to deter the Appellant from expending money and effort to extract and market the sand and gravel from the claims in question from the time of location in 1946 until approximately 1963. In fact, the lack of development of the claims were such that as of July 23, 1955, the Appellant had not even constructed a road to them.
>
> Based upon the record before it, we conclude that the District Court was correct in dismissing the action by way of Summary Judgment. [Italics added.]

The Court's decision in *Clear Gravel* is in full accord with the rationale of the court in *Osborne* v. *Hammit*, *supra*, regarding the credibility of opinion evidence on the marketability of common variety sand and gravel deposits. Similarly, there is not credible evidence in the present case.

The contestees' evidence to show a demand for the material as of

July 23, 1955, is not satisfactory, as the Judge, indeed, concluded. O'Connor's testimony of the lease arrangements does not establish a demand for the material. The failure to present a copy of the lease limits any weight such lease might be accorded in demonstrating a demand for the material. *United States* v. *Block*, 12 IBLA 393 (1973). If anything, the fact nothing was done by the lessee tends to support an inference that it was not marketable at that time, rather than the converse being true. This is reinforced by the fact nothing further was done with the claim, other than a few drill holes made in 1958, until 1968 and 1969, when O'Connor testified he found a buyer for the claim, the Colorado Excavating Company, which was going to open a cut until the Forest Supervisor stopped the contestees from going ahead (Tr. 55). Thus, except for a few drill holes and other assessment work, the claim lay idle for some 13 to 14 years after common varieties were declared to be no longer a valuable mineral deposit under the mining laws.

Furthermore, to establish that the claimant was in a position to market material from the claim prior to July 23, 1955, he would have to know whether the material was salable. This would include information that it was of a marketable quality and in a quantity sufficient to warrant development expenses, as well as other pertinent information regarding the marketplace. Such information was not known in 1955 as evidenced from O'Connor's testimony showing his lack of knowledge of market conditions at that time, and also because no testing or drill holes of the material from the claims had been made at that time.

The claimant—not the Government's examiner—must ascertain by workings, drill tests, and the like on the claim, prior to July 23, 1955, that the quantity of sand and gravel on a claim was sufficient to persuade a prudent man to expend his labor and means, with a reasonable prospect of developing a valuable sand and gravel operation. *United States* v. *Henrikson*, 70 I.D. 212, 216–17 (1963), *aff'd*, *Henrikson* v. *Udall*, 350 F.2d 949 (9th Cir. 1965), *cert. denied*, 384 U.S. 940 (1966). In *Henrikson* it was not sufficient that drill tests and workings had established a sufficient quantity of sand and gravel on an adjoining claim, when there were no such tests or workings on a claim declared invalid for failure to meet the prudent man-marketability test. Because the contestees in the present case had likewise failed to establish the necessary information upon which a prudent man could determine the character of the deposit by July 23, 1955, the prudent man test was not satisfied at that time.

[10] We find no support for contestees' contention that the claim could be recognized as being held for a reserve. In effect, contestees are trying to put the proverbial cart

before the horse. The "reserve rule" limits the amount of mineral land deemed valuable by a discovery. It cannot come into operation until a discovery has been established. *United States* v. *Stewart*, 5 IBLA 39, 55, 79 I.D. 27, 34–35 (1972). It is not, therefore, a substitute for discovery. All of the criteria of discovery, including the marketability criteria for sand and gravel deposits, must be satisfied prior to July 23, 1955, for a common variety of sand and gravel, before the reserve issue may even be considered. *Id.* Such criteria have not been satisfied in this case.

Although contestees have now shown that the gravel is in a quantity and quality that may meet marketable criteria for certain uses, this was not established by them until years after 1955. Thus, in 1955, they did not have sufficient information to know whether the material could be used in the future for recognizable purposes. Likewise, they had no business in 1955 for which they needed to hold a reserve, nor have they ever been in the sand and gravel business. O'Connor apparently had not investigated market prices in 1955. The contestees' nondevelopment of the claims was not because they were extracting and selling other materials, but because O'Connor wanted to wait to see if the price for material would rise and because he was not assured of a continuous demand for the material. While in hindsight, as a practical matter, it may have been prudent for someone to hold material until closer sources to the market were exhausted, in 1955 this hope of future potential profitable sales was speculative. A mining claimant's desire in 1955 to hold a claim for speculative purposes in the hope that a future market will develop to warrant development of the claim does not satisfy the marketability test. *Barrows* v. *Hickel*, 447 F.2d 80 (9th Cir. 1971).

[11] The general opinion testimony on the possibility of a claimant's ability to market the material from the claim is contradicted by the more specific testimony which tends to show that development of the claims in 1955 was not warranted under the marketplace conditions at that time and, therefore, it is not credible evidence. *See Osborne* v. *Hammit*, *supra*. To stretch the prudent man-marketability test to cover such facts would completely negate the clear intention of Congress by the Act of July 23, 1955, to close common varieties of sand and gravel and certain other materials to location under the mining laws, and make them disposable only by sale under the Materials Act (30 U.S.C. § 601 (1970)). *Coleman* v. *United States*, *supra*. To accept the unsupported conjectural opinion that a person could have profitably marketed the material from these claims in 1955, as credible evidence and a preponderating establishment of the

fact of marketability in this case, would make it impossible to refute the supposed fact and would, in effect, transfer the risk of nonpersuasion from the mining claimant to the Government. It would also destroy the safeguards of the marketability test set forth in the Acting Solicitor's Opinion quoted, *supra*, and in *Foster* v. *Seaton*, *supra*, to assure that claims for common varieties of materials found in wide abundance will be developed for mining purposes and not for other purposes. We cannot ascribe to any such erosion of the marketability test.

Contestees had not established the character of the deposit in 1955. It is also evident from the credible evidence in this case, that the additional criteria of the marketability test were not satisfied as there was no *bona fides* in development, there was no showing of a present demand for the materials from the claim in 1955, the claim was not well situated to the larger market area at that time and the closer, local market was sporadic and would not serve to make a profitable operation. Despite conditions now, the prudent man-marketability test was not satisfied as of July 23, 1955, as required to sustain the claim, and it must be declared invalid.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the Ute Park No. 1 mining claim is declared null and void.

JOAN B. THOMPSON,
Administrative Judge.

I CONCUR:

MARTIN RITVO,
Administrative Judge.

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

While not in full accord with every statement made in the majority opinion, I agree generally with the rationale and the result. The purpose of this separate opinion is not to delineate my differences with the majority opinion, but rather to express the basis for my concurring therein.

First, the Administrative Law Judge recognized that the contestant's evidence showing there was no mineral development or sale of materials from the claim raised a presumption that there was no market, and that this was sufficient to establish a prima facie case. *United States* v. *Gibbs*, 13 IBLA 382 (1973). In light of this, I believe that the Judge devoted entirely too much concern and emphasis to his finding that the contestant failed to make a prima facie case which related directly to the quantity and quality of the gravel on the claim. It is only incumbent on the contestant to make one prima facie case, which the contestant succeeded in doing by raising the presumption

that the material was not marketable on the critical date. The nonmarketability thus shown need not relate to the quantity or quality of the gravel. It could have to do with the absence of a demand, *see United States* v. *Bartlett*, 2 IBLA 274, 78 I.D. 173 (1971); or some physical element which would make mining costs prohibitive, *United States* v. *McCall*, 7 IBLA 21, 79 I.D. 457 (1972); or because longer hauling costs make the material noncompetitive, as in *United States* v. *McCall*, 1 IBLA 115, 119 (1970). Therefore, the contestant was under no obligation to supply evidence that the quality of the gravel was substandard or that the quantity was insufficient on the Ute Park No. 1 claim. The contestant might even have adduced evidence that the quantity and quality were exceptionally good without destroying the prima facie case that the material was nevertheless nonmarketable on the critical date. The contestant having made a prima facie case, it then devolved upon the contestees to rebut that case by a persuasive showing that material from the claim could have been marketed at a profit on the critical date and that such marketability has continued without substantial interruption. If the contestees had succeeded in this, they would have been entitled to a finding that their claim was valid. Having failed in this, however, the claim must be held invalid. There is no way to avoid a determination of the issues presented where all of the available evidence going to the merits of those issues has been fully and fairly heard.[1]

The crux of the Judge's error lies in the following quotation from the decision:

> While the contestees have destroyed the inference that the gravel could not have been marketed at a profit in 1955, they *have not* presented sufficiently detailed evidence to support the conclusion that a person of ordinary prudence would have been justified in working the property prior to July 23, 1955, with a reasonable prospect of success in developing a valuable mine. *A reasonable prudent person would certainly have to have more information than that presented by the contestees in order to reach a rational decision as to whether the market and other factors were such as to warrant the*

[1] It is possible to hypothesize a situation in which a mining claim contest could be properly dismissed without a ruling on the issues after the contestant had offered an apparent prima facie case. For example, if the prima facie case of "no discovery" consisted exclusively of the testimony of contestant's expert witness that he had examined the claim on a certain date, made specific observations and formed an expert opinion based thereon, that opinion and the prima facie case could be rebutted by the contestee's showing that on the date in question the contestee's witness had been off on a frolic and detour of his own, that he had never examined the claim at all, and that his entire testimony was perjured. Having established only this and nothing more, the contestee would, upon a proper motion, be entitled to a summary dismissal of the contest without any ruling as to the issues relating to the merits of the claim. Of course, such a dismissal would be without prejudice to the Government's right to bring another action to test the validity of the claim. The distinction between the hypothetical case and the one at bar lies in the fact that where the contestee attempts to rebut the prima facie case *on the merits of the claim*, it can only do so by a preponderance of countervailing evidence.

development of the property. (Italics.) added).

Dec. p. 12.

Where a prima facie case of invalidity has been made by raising a presumption that the material was not marketable at a profit on the critical date, that presumption can only be "destroyed" by a preponderance of evidence which establishes that the material was in fact marketable then. The procedural and evidentiary rules which govern contests must not be so construed that nothing can be decided after all the evidence of both sides has been presented, because such a result converts a quasi-judicial proceeding into an exercise in futility. The trier of fact must allow himself to be persuaded that one side or the other has prevailed, or else nothing has been accomplished.

The answer is suggested by the italicized sentence in the above quotation from the Judge's opinion. If, as the Judge found, the contestees did not have enough information about the gravel deposit on which they could have based a reasonable, rational and prudent decision to proceed with development of the property, they cannot be said at that time to have "discovered" a valuable deposit.

Certain knowledge of the mineral and its economic worth is inherent in the act of "discovering" a "valuable deposit" of that mineral. This includes a recognition of the mineral, a general appreciation of its uses, and a sufficient understanding of the economics of exploiting the mineral as would enable the finder to make an informed preliminary judgment as to whether the deposit is economically valuable or not. One who merely stakes out a mining claim on speculation, without knowing what the land contains, or with no comprehension of whether the located deposit is economically "valuable," as required by statute, can hardly be said to have "discovered" a valuable mineral deposit as of that date, even though at some later time it is learned that a valuable mineral deposit actually does exist within the limits of the claim. In determining whether a mining claim has been validated by a discovery of a valuable mineral deposit, each case must be examined on its own facts by applying the prudent man test, *which includes a consideration of economic factors upon which a prudent man's expectation of developing a valuable mine would be based. United States* v. *Hines Gilbert Gold Mines Co.*, 1 IBLA 296 (1971).

In the instant case the Administrative Law Judge concluded that on July 23, 1955, the contestees lacked the basic information essential to a prudent man's formulation of an expectation of developing a valuable mine. On that basis alone he should have held that they had not effected a discovery and that the claim is invalid.

Additionally, in his recapitulation of the evidence the Judge made the following analysis:

The above testimony would seem to indicate that, while there might have been some market for the material in 1955, *the*

market was not such as to warrant a person of ordinary prudence in proceeding with the development of the claim. It appears, however, that the mining claimant, who runs a garage and service station, was not, at that time, particularly familiar with the market conditions; that he had not made any survey or analysis of the market for the gravel from the claim; and that he was expressing opinions as to marketability and profitability on the basis of limited information gained from a few individuals who had contacted him on an occasional basis in an effort to purchase gravel. (Italics.) added.)

Dec. p. 10.

This, too, would seem to compel a conclusion that the market in 1955 was not such as would reasonably support development of the claim, and that the claimant's opinion to the contrary was premised on inadequate information.

Moreover, as noted in the majority opinion, O'Connor testified that he was holding the claim in the belief that inflation would make it more valuable and in anticipation that the growth of the City of Colorado Springs would have the same effect. He also testified that he made no attempt to sell material to the Highway Department in 1955 "* * * because we was waiting for the highways to be changed, which we knew was coming in the future * * *" (Tr. 65, 66). This speculation on the future growth of a nearby city and upon future highway construction in the area brings the case into close kinship with *United States* v. *Isbell Construction Co.*, 4 IBLA 205, 78 I.D. 385. 395 (1971). In that case we held that a sand and gravel claim could not be treated as valid on July 23, 1955, where it had no viable market, but was being held in anticipation that community expansion would eventually create a market and reduce hauling costs so that future development would be feasible.

The strongest testimony on behalf of the claimants was presented by Frank O. Washam, who was president of Rocky Mountain Paving Company, of Colorado Springs, in 1955. He stated that it was his opinion that the claimants could have sold material from the claim at a profit in 1955. This, of course, is the *sine qua non* in the determination of the validity of any claim located prior to July 23, 1955, for a common variety of mineral. *United States* v. *Gibbs*, *supra*, and cases cited therein. However, upon analysis, it does not appear that Washam's opinion was formed on the basis of any authoritative knowledge of a substantial market which actually existed for this material in 1955. His own company, Rocky Mountain Paving, was a user of great quantities of gravel, and in 1955, he said that his company was the only asphalt paving plant in the city (Tr. 86), that they had a monopoly for several years (Tr. 99), but that in 1955 he would not have used gravel from the Ute Park claims even if he owned them, because, "I would not have hauled it that far in 1955, until closer deposits were depleted." (Tr. 95.)

Washam felt that if the claimants had set up a screening plant and created a stockpile of gravel they could have sold considerable quantities to small users (Tr. 89), indicating that it would be purchased by various users such as householders, motels (to gravel parking lots) and for streets and landscaping (Tr. 90). However, much of his estimate of the available market in 1955 was so speculative that it must be discounted altogether, *e.g.*, "A community such as Green Mountain Falls *might have been* graveling a lot of streets, and would have brought a considerable quantity * * *." As to the market demand created by gravel use by the State, the question was premised as follows: "Now *if* the State of Colorado wished to procure gravel, *and we don't know whether they did or not* * * * do you believe this gravel would be competitive * * *?" He named several communities in the vicinity of the claims which might have afforded a market, but on cross-examination he conceded that he didn't know what their populations were in 1955, except that they were "much less than today" (Tr. 98); that Green Mountain Falls was "very small," and he described all of these communities as "villages." (Tr. 99.) He testified that his company sold sand and gravel in these villages, but he did not indicate any quantity (Tr. 99). He also acknowledged that "a lot" of small users in that area simply could go and pick up gravel off the National Forest, and did so. (Tr. 100).

In short, Washam's testimony failed to point out the existence of any market demand in the area of such dimension as would have justified development of the Ute Park No. 1 claim between the time it was located on April 4, 1955, and the enactment of P.L. 167 on July 23, 1955. Here, again, there is a marked similarity with the factual situation which obtained in *United States* v. *Isbell Construction Co.*, *supra* at 226, 78 I.D. 396.

The contestee-appellants, in their statement of reasons for appeal, make repeated references to *United States* v. *Gibbs*, *supra*, and *United States* v. *Harenberg*, *supra*, in an effort to bring this case within the ambit of those decisions. As the author of the majority opinion in both *Gibbs* and *Harenberg* I feel particularly well qualified to draw the distinctions between those cases and this one.

In both *Harenberg* and *Gibbs* the evidence that the claimants could have profitably mined their respective claims in 1955 was *factual evidence* of conditions *actually prevailing* at that time. By contrast, the evidence offered by the contestees in this case was, to a large extent, speculation that *if* certain conditions had prevailed in 1955, these would have afforded a market into which the claimants might have been able to dispose of their material at a profit. Testimony that *if* the State had then wished to procure gravel in the area profitable sales could have been made, or that a nearby community *might have been* gravel-

ing a lot of streets does nothing to establish that a profitable market actually existed. The testimony that homeowners and other small volume users in the immediate vicinity would have purchased the material in 1955, had it been available, fails to establish that the claimants would have been justified, as prudent men, in expending their labor and means in installing and operating a screening plant on the Ute Park No. 1 claim in the reasonable expectation that sales of small lots of material to such purchasers would have been a profitable venture.

In both *Harenberg* and *Gibbs* this Board found that the claims in question constituted a reasonable reserve supply of materials which the claimants needed for the continuation of their respective businesses on the basis of their foreseeable needs, reasonably projected. This, I submit, is an entirely different circumstance from that where claimants having no connection with the business seek to lock up a resource until such time as the depletion of other supplies make "their" deposits valuable. It is true, as the contestee-appellants assert, that there is nothing in the law which would require the holders of a *valid* claim to proceed with development rather than wait for the deposit to become more valuable, but the concept of a reserve requires that the claimant be in the business, have more than one source of supply which could be exploited profitably at the time, and that the entire supply be needed to sustain his business operation over a reasonable term of time. Under these conditions a decision to exploit one of his sources while holding the other(s) as a reasonable reserve is within the contemplation of the law.

However, where, as here, the claimants have not demonstrated to the satisfaction of the Administrative Law Judge or to this Board that the claims were valid on the critical date, and they were not engaged in the business of mining and selling the material, their assertion that they were holding the deposit as a reserve supply cannot be brought within the purview of the *Harenberg* and *Gibbs* decisions. As stated in *Gibbs*, "The holding of a mining claim for future development without present marketability does not impart validity to a claim." (Syllabus)

I share the opinion of the panel majority and the Administrative Law Judge that the claimants failed to show that they could have extracted and sold materials from the Ute Park No. 1 claim at a profit during the period from April 4, 1955, to July 23, 1955, and I conclude, therefore, that the claim must be held null and void.

EDWARD W. STUEBING,
Administrative Judge.

572-435—75——3

BISHOP COAL COMPANY

4 IBMA 52

Decided *March 14, 1975*

Appeal from a decision of Administrative Law Judge William Fauver assessing $2,000[1] for a violation of section 304(a) (30 U.S.C. § 864(a)), of the Federal Coal Mine Health and Safety Act of 1969, under Docket No. HOPE 72-41-P.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

Where the evidence fails to show the composition of an accumulation of materials to be loose coal, coal dust, or other combustible matter and does show that the accumulated materials were soft and ranged from damp to wet, there is no basis upon which to conclude that a violation of 30 U.S.C. § 864(a) has occurred.

APPEARANCES: Ivan Michael Shaeffer, Esq., and Timothy M. Biddle, Esq., for appellant, Bishop Coal Company; John P. McGeehan, Esq., Edward J. Rodzinak, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

The subject of this appeal is Order of Withdrawal No. 1 MFS, issued by a Bureau of Mines (now Mining Enforcement and Safety Administration) inspector on June 8, 1970 in Bishop Coal Company's (Bishop) No. 33-37 Mine. The order, issued pursuant to section 104(a) (30 U.S.C. § 814(a)) of the Federal Coal Mine Health and Safety Act of 1969 (Act)[2] cited the following condition:

> Excessive coal dust spillage was present in the shuttle car haulageways from the belt feeder to the working places and loose coal and coal dust were present along the ribs of these haulageways.

A hearing was held in Princeton, West Virginia, on April 19, 1974. In his initial decision, dated August 22, 1974, the Administrative Law Judge (Judge) found that the Mining Enforcement and Safety Administration (MESA) had proved the violation alleged in the above order and assessed $2,000 therefor. The Judge made the following findings: 1) coal dust accumulations, resulting from "shuttle car spillage over a long period" were spread over each of five haulageways (a total area in excess of 12,000 sq. ft.) in violation of section 304(a) of the Act; 2) while the coal dust ranged from "damp to wet" it "was still combustible and could propagate an explosion or fire"; 3) the ac-

[1] Additional assessments totaling $40 for other violations are not in issue in the instant appeal.

[2] 30 U.S.C. §§ 801-960 (1970).

cumulations constituted "an extremely serious hazard of propagating a mine fire or explosion"; and 4) the operator was negligent in failing to prevent and clean up the accumulations.

Contentions of the Parties

Bishop contends that 1) a violation of section 304(a) of the Act was not proved and 2) that the Judge erred in failing to state adequate reasons for his finding that the alleged accumulations constituted an extremely serious hazard of propagating a mine fire or explosion. MESA supports the Judge's findings and prays for affirmance.

Issue

Whether the Judge properly concluded that a violation of section 304(a) (30 U.S.C. § 864(a)) was proved, and, if so, whether his findings as to the gravity of the violation are supported by the record.

Findings of Fact and Discussion

The record contains a considerable amount of conflicting evidence. We agree with Bishop that the initial decision does not sufficiently reflect whether the Judge evaluated or weighed this evidence in arriving at the conclusion that an extremely serious accumulation of combustible materials was proved. We deem it necessary, therefore, to recite the material testimony and make our own findings of fact on which our decision is based.[2]

We turn first to the inspector's testimony. He stated that he issued the order for "excessive coal dust spillage in [five or six] shuttle car haulageways * * *" which had loose coal and coal dust present along their ribs (Tr. 10, 11). The order was issued, according to the inspector, "*not for imminency*" but to ensure that cleanup would be started and no coal loaded (Tr. 31, 32). The alleged accumulations ranged from rib to rib (Tr. 14) over a computed total area (five or six haulageways) in excess of 12,000 sq. ft., and had accrued over a long period of time (Tr. 17–18). The inspector could not distinguish the color of the alleged accumulations (Tr. 14), stating that what he saw was coal that had been chewed up by traveling shuttle cars and machinery (Tr. 19). Though he did not pick up any of the materials, he thought they were "damp to wet" but not too wet to propagate an explosion (Tr. 23, 24). In his view "loose coal and coal dust whether wet or not" could propagate an explosion (Tr. 15) and electrical equipment always presented potential sources of ignition. He thought that there could have been rock dust on the roof and

[2] In lieu of a remand, the Board may make appropriate corrections where an Administrative Law Judge fails to incorporate in his decision the necessary findings of fact or reasons therefor as required by the Administrative Procedure Act, 5 U.S.C. § 557. See *Associated Drilling, Inc.*, 3 IBMA 164, 81 I.D. 285, 1973–1974 OSHD par. 17,813 (1974).

ribs but felt that "generally * * * these wetted conditions eliminated [Bishop] from rock dusting the floor" (Tr. 25).

Bishop's Assistant Mine Foreman, who had accompanied the inspector was accepted at the hearing as an expert in mine health and safety. He testified that he did not recall an accumulation and felt that the condition of the bottom coupled with natural drainage, would cause any coal dust or loose coal to appear to be present in larger quantities than it actually was (Tr. 59). He conceded that some spilled coal was present in the vicinity of a belt feeder but thought that it wasn't enough to warrant cleaning up (Tr. 58, 64).

Bishop's vice president, who did not observe the conditions for which the order was issued, also testified on behalf of the operator. In his opinion, the effect of water

> * * * will make it impossible to tell whether you have an accumulation of coal dust, whether you have an accumulation of coal and rock dust and clay or really what is there. Water mixed with these materials, if there's a little bit of coal in it will turn it almost completely black * * * (Tr. 78).

Testifying generally with respect to dust samples that had been taken from the mine on other occasions and tested for incombustibility content, this witness stated:

> Those [samples] that were black with water mixed in with them, the appearance was very bad but the average ran over 65 percent incombustible. So when you go on appearance white doesn't mean that its good and black doesn't mean that its bad. And we had samples that were with water mixed, absolutely black that ran as high as 83 percent [incombustible content] (Tr. 79).

We list finally 7 facts which are not in dispute: 1) the areas for which the order was written were wet due to the natural drainage of water into the mine (Tr. 25, 56, 77); 2) the "bottom" was soft (Tr. 56) and travelways were rutted from shuttle car traffic; 3) a rib sloughage problem existed in the mine (Tr. 63); 4) where a sloughage problem exists it is hazardous to remove fallen material from the base of the ribs because such removal would tend "to create some brows and * * * wider places with less roof support" (Tr. 29); 5) the hazard created by sloughing coal is dealt with by keeping such coal out of the travelways and rock dusting it at intervals (Tr. 29); 6) there was no methane present, and no permissibility, trailing cable, or ventilation violations were found (Tr. 15–27); and 7) no samples were taken of the alleged accumulations nor analyses made.

The Board finds from this evidence that: 1) the travelways were soft and ranged from damp to wet; 2) vehicular traffic could and did make ruts in the travelways; 3) the color of the materials on the travelway floors was not established; 4) the composition of these materials as loose coal, coal dust, or other combustibles was not established; and 5) sources of potential ignition were remote.

[1] The Board has held that a violation of section 304(a) of the Act may be based upon visual observation without need of measurement or samples.[4] As a minimum, however, evidence of depth and extent of an alleged mass of combustible material must appear in the record to allow the trier of fact to determine whether a dangerous accumulation is present.[5] Since no standard has been established defining precisely under what circumstances an accumulation constitutes a violation of section 304(a) each case must be decided individually on the basis of the evidence of record. Having carefully considered the testimony, we are compelled to conclude that indications of the presence of alleged combustible materials are too seriously impugned by countervailing evidence to support a finding of a violation of section 304(a) of the Act. We note first that the inspector made no observations as to the depth of the alleged coal dust or size of loose coal or coal particles. His statement that he had no doubt that it was coal is not probative of depth or extent of combustible materials present, or of their combustibility in view of the soft bottoms of the haulageways and the presence of water. The remoteness of ignition hazards, the inspector's motive in issuing the order, and his surmise that because of wetness it may not have been necessary to inert the floors of the haulageways with rock dust[6] militate strongly against the conclusion that any combustible materials that may have been present constituted a dangerous accumulation. Moreover, since the inspector did not perform the test prescribed by the regulations[7] *i.e.*, squeeze a ball of finely divided material in his hands to observe whether water would be exuded, his opinion that the dust was not too wet to propagate an explosion is of minimal probative value. We conclude that the accumulation cited in the order was not shown by a preponderance of the evidence to have been an accumulation of coal dust, loose coal, or combustible materials within the meaning of section 304(a) of the Act. We therefore vacate the violation charged in Order of Withdrawal No. 1 MFS, June 8, 1970.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)); IT IS HEREBY ORDERED that the decision of the Administrative Law Judge BE and HEREBY IS REVERSED with respect to the violation charged in Order of Withdrawal No. 1 MFS, June 8, 1970, and that the assess-

[4] *Coal Processing Corporation*, 2 IBMA 336, 80 I.D. 748, 1973–1974 OSHD par. 16,978 (1973).

[5] *North American Coal Corporation*, 3 IBMA 93, 81 I.D. 204, 1973–1974 OSHD par. 17,658 (1974).

[6] In 30 CFR 75.402 it is stated that coal dust may be "too wet" to propagate an explosion, and need not, for this reason, be rock dusted.

[7] This test is set forth in 30 CFR 75.402–1.

ment of $2,000 therefor IS SET ASIDE.

IT IS FURTHER ORDERED that Bishop Coal Company pay the remaining civil penalty assessed in the amount of $40 within 30 days from the date of this decision.

C. E. ROGERS,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

DONALD E. AND NANCY P. JANSON (ON RECONSIDERATION)

19 IBLA 154

Decided *March 14, 1975*

Petition for reconsideration of the decision of the Board of Land Appeals in Donald E. Janson, 16 IBLA 66 (1974).

Reconsideration granted; decision of June 25, 1974, reversed.

1. Federal Employees and Officers: Interest in Lands—Grazing and Grazing Lands—Grazing Leases: Generally—Grazing Leases: Cancellation or Reduction—Grazing Leases: Preference Right Applicants

Where a section 15 grazing lease is issued to an applicant whose brother is an employee of this Department, and such employee owns stock in the corporation that owns the contiguous fee land, control over which the applicant asserts as the basis for his preference right to the grazing lease, such applicant cannot be granted the desired grazing lease. Any such lease must be canceled when the facts are called to the Department's attention. This result occurs under 43 CFR 7.2 and 7.3 which prohibit any employee from acquiring or retaining any interest in the lands or resources administered by the Bureau of Land Management. The prohibition extends to any interest in land which in any manner is connected with or involves the use of the grazing resources administered by the Bureau of Land Management.

APPEARANCES: Donald E. Janson and Nancy P. Janson, pro se; Calvin N. Brice, Esq., of Cook & Brice, Ltd., Phoenix, Arizona, for Kendall Cumming; Douglas Cumming, pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Donald E. Janson and Nancy P. Janson have petitioned for reconsideration of the decision of this Board in *Donald E. Janson*, 16 IB LA 66 (1974), in which the Board affirmed a decision of the Phoenix District Office, Bureau of Land Management (BLM). That decision rejected in part the Jansons' application for a grazing lease under section 15 of the Taylor Grazing Act, *as amended*, 43 U.S.C. § 315m (1970). The BLM rejected the Jansons' application for the 271-acre parcel at issue in this petition because it found that Douglas Cumming,[1] the conflicting preference-

[1] Cumming Land & Livestock Corporation originally filed an application for these lands some time prior to the expiration of the Jansons' lease in 1973. (Letter from Douglas

right applicant under 43 CFR 4121.-2-1(c)(1), could more advantageously use the tract. A lease for the lands in conflict was issued to Douglas Cumming on August 1, 1974.

The Jansons present two arguments in their petition which they maintain justify reversal of the prior decision. First, regarding the merits of the award of the grazing rights, they "disagree with the Board of Land Appeals reasoning in its decision one hundred percent." They argue that the factors cited by the BLM in support of the award to Douglas Cumming, particularly topography and availability of water, were erroneously relied upon in reaching the decision.

We need not discuss the first issue since the second issue, set forth below, is dispositive of the case. The assertions made by the Jansons were offered for the first time after our earlier decision.

[1] The Jansons' second argument is that "there is a clear-cut and uncomplicated case of conspiracy and fraud involving the [Cumming Land and Livestock] Corporation and the United States Government officials for the purpose of taking over the lease from the Jansons." Petitioners support this assertion by pointing to: the gut reaction of a friend to a BLM employee; the fact that the BLM supplemented the record on appeal with additional reasons for its decision; crossed-up communications with the BLM; the BLM's failure to agree with all the assertions in the Jansons' lease application; and the fact that a co-owner of Cumming Land and Livestock Corp. is an employee of the Department of the Interior. The facts asserted, however, do not constitute the conspiracy perceived by petitioners.

We expressly find nothing in this record constituting evidence of misconduct in the award of the lease at issue here. That the BLM knew that Kendall Cumming, half-owner of Cumming Land and Livestock Corp., works for the Bureau of Indian Affairs of the Department of the Interior does not show undue influence.[2]

Independent of any question of misconduct or influence, however, the information presented by petitioners raises the issue of whether Kendall Cumming's employment disqualifies Douglas Cumming, Kendall's brother and owner of the other half of the stock of Cumming Land and Livestock Corp., from holding the lease issued for the land involved here. In response to petitioners' assertions, counsel for Ken-

Cumming to District Manager, March 14, 1973.) When the lease came up for renewal, Douglas Cumming filed the conflicting application in his own name on April 10, 1973. This confusion, and our erroneous caption in the original decision, are due to the fact that Douglas Cumming signed much of the correspondence, including his answer to petitioner's Statement of Reasons for Appeal, as "President, Cumming Land and Livestock Corp." However, the lease at issue was applied for and issued to Douglas Cumming in his individual capacity.

[2] As indicated in footnote 1, *supra*, Cumming Land & Livestock Corp. first applied for this land before the Jansons' previous lease expired. Whether or not the District Manager knew anything about Kendall Cumming or his stockholder's interest in the Corporation (when treating the corporation as a qualified applicant under 43 CFR 4121.1-1(c) or otherwise) is not revealed by the record.

dall Cumming appeared and responded: 1) that Cumming Land and Livestock Corp. owns 160 acres of base lands, but neither it nor Kendall Cumming nor his spouse own any cattle; 2) that Douglas Cumming leases the base fee lands from the Corporation, personally owns the cattle and runs the ranch operation; 3) Kendall Cumming will place control of and voting rights to his stock in the Corporation in a voting trust until he leaves federal employment; and 4) Kendall Cumming's superiors have been fully informed of this potential problem.

We look to the provisions of 43 CFR 7.2 and 7.3 to see whether Kendall Cumming's ownership of 50 percent of the stock of the Corporation owning land, upon which Douglas Cumming's preference right is predicated, interdicts the granting of the lease to Douglas Cumming and his holding the lease. These regulations provide in applicable portion as follows:

§ 7.2 Definitions.

(a) The term "employee" as used in this part includes any person employed by the Department of the Interior, or any of its bureaus or offices however designated.

(b) The term "interest" means any *direct or indirect ownership in whole or in part of the lands or resources in question, or any participation in the earnings therefrom,* or the right to occupy or use the property *or to take any benefits therefrom based upon a lease or rental agreement,* or upon any formal or informal contract with a person who has such an interest. *It includes membership in a firm, or ownership of stock* or other securities in a corporation which has such an interest: *Provided,* That stock or securities traded on the open market may be purchased by an employee if the acquisition thereof will not tend to interfere with the proper and impartial performance of the duties of the employee or bring discredit upon the Department.

(c) The prohibition in § 7.3 includes but is not limited to the buying, selling, or locating of any warrant, scrip, lieu land selection, soldier's additional right, or any other right or claim under which an interest in the public lands may be asserted. *The prohibition also extends to any interest in land,* water right, or livestock, *which in any manner is connected with or involves the use of the grazing resources or facilities of the lands or resources administered by the Bureau of Land Management.*

§ 7.3 Prohibition.

(a) An employee and the spouse of an employee, except as provided in §§ 7.4 to 7.6, are prohibited from:

(1) Voluntarily acquiring an interest in the lands or resources administered by the Bureau of Land Management;

(2) *Retaining an interest* in the lands or resources administered by the Bureau of Land Management acquired voluntarily or by any other method, before or during employment by the Department of the Interior.

(Italics supplied.)

It is clear and undisputed that Kendall Cumming, as an employee of the BIA, is an "employee" of this Department, within the ambit of 43 CFR 7.2(a). His 50 percent interest (or any interest) in the Corporation falls within the purview of an "indirect ownership." The use of the fee land as bestowing a preference right to be considered for a section 15 lease seems to be disconsonant with Kendall Cumming's obligation not "to take any benefits therefrom

[*i.e.*, the public lands] based upon a lease or rental agreement." Fee lands which adjoin public lands are in some circumstances a proper base for a preference right of consideration for a section 15 grazing lease. Thus the rental value of the fee lands is enhanced.

But what is more to the point, the prohibition against an Interior employee acquiring any interest in public land also extends "to any interest in land * * * which in any manner is connected with or involves the use of the grazing resources * * * administered by the Bureau of Land Management." 43 CFR 7.2(c).

It is clear that the Cummings' fee right land would be used in connection with the lands embraced in the section 15 lease issued to Douglas Cumming. We find that in the circumstances, Douglas Cumming's grazing lease cannot be permitted to stand. That Kendall Cumming has offered to place control and voting rights in a trust until he leaves federal employment does not vitiate the effect of the regulation. He would still have a beneficial interest in the base land used in connection with a public land grazing lease.

Since the Jansons were the only preference-right applicants for public lands qualified to make proper use of their contiguous fee lands, they must be awarded the grazing lease they seek, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is granted in order to treat the newly raised issue, and on reconsideration, the decision of the Board of June 25, 1974, is reversed.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

MARTIN RITVO,
Administrative Judge.

JOSEPH W. GOSS,
Administrative Judge.

ITMANN COAL COMPANY

4 IBMA 61

Decided *March 18, 1975*

Appeal by Itmann Coal Company from a decision by Administrative Law Judge William Fauver (Docket Nos. HOPE 72-48-P and HOPE 72-162-P), dated August 29, 1974, assessing civil monetary penalties in the amount of $8,530 for 31 violations pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969,[1] hereinafter the "Act."

Reversed in part and affirmed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Evidence: Sufficiency

A violation of section 304(a) of the Act is not established where neither the notice, order, nor the evidence at hearing

[1] 30 U.S.C. §§ 801-960 (1970).

shows the nature and extent of the accumulation of loose coal, coal dust or float coal dust.

2. Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Generally

A violation of a mandatory health or safety standard is not established where compliance is impossible due to the unavailability of equipment, materials, or qualified technicians.

APPEARANCES: Timothy M. Biddle, Esq., L. Thomas Galloway, Esq., and James T. Hemphill, Jr., Esq., for appellant, Itmann Coal Company. The Mining Enforcement and Safety Administration did not participate in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

This appeal involves 15 alleged violations of the Act or Regulations contained in 12 Notices of Violation and two Orders of Withdrawal. The Notices and Orders are contained in the two dockets, HOPE 72–48–P and HOPE 72–162–P, consolidated for consideration by the Administrative Law Judge (Judge). A total penalty of $7,830 was assessed by the Judge for these alleged violations. The other 16 violations before the Judge for which he assessed a total penalty of $700 are not contested in this appeal.

Itmann Coal Company (Itmann) is appealing seven alleged violations of section 304(a) of the Act (loose coal and coal dust or float coal dust accumulation) contained in five Notices and two Orders.[2] Itmann is also appealing seven alleged violations of various provisions in the Regulations requiring the use of certain equipment in mines,[3] and one alleged violation of section 302(a) (unsafe roof) contained in an Order also alleging a violation of section 304(a).[4] For purposes of this appeal, the alleged violations of section 304(a) will be considered collectively, the alleged violations for failure to have equipment required by the Regulations will be considered together, and the alleged violation of section 302(a) will be considered separately.

[2] The alleged violations of section 304(a) were cited in *Notice of Violation No. 1 GSV, June 18, 1970, Notice of Violation No. 1 WVC, August 14, 1970, Notice of Violation No. 2 WVC, August 19, 1970, Order of Withdrawal No. 1 WVC, December 8, 1970, Notice of Violation No. 1 JEK, December 1, 1970, Notice of Violation No. 1 JEK, December 3, 1970, Order of Withdrawal No. 1 JEK, January 13, 1971.*

[3] The alleged violations for failure to have certain safety equipment required by the Regulations were cited in *Notice of Violation No. 1 JEK, January 14, 1971* (30 CFR 75.307–1), *Notice of Violation No. 4 JEK, January 14, 1971* (30 CFR 75.808), *Notice of Violation No. 3 JEK, January 21, 1971* (30 CFR 75.808), *Notice of Violation No. 1 JEK, January 27, 1971* (30 CFR 75.1100–2(b)), *Notice of Violation No. 2 JEK, February 4, 1971* (30 CFR 75.1100–2(b)), *Notice of Violation No. 2 JEK, February 16, 1971* (30 CFR 75.1100–2(b)), *Notice of Violation No. 2 JEK, February 23, 1971* (30 CFR 75.1100–2(b)).

[4] The alleged violation of section 302(a) was cited in *Order of Withdrawal No. 1 WVC, December 8, 1970.*

A. The Section 304(a) Violations

Based upon evidence and testimony received at the hearing held April 17–18, 1973, in Princeton, West Virginia, the Judge found that all seven of the cited accumulations had existed and constituted violations of section 304(a) of the Act as described in the Notices and Orders. In considering the six statutory criteria of section 109(a) of the Act, the Judge concluded that Itmann was negligent in permitting the cited conditions to exist, the violations were serious, good faith was exhibited in abating the conditions cited, and the penalties assessed would not affect Itmann's ability to continue in business. Consequently, he assessed civil penalties in the total amount of $6,600 for these seven violations of section 304(a).

B. The Lack of Required Equipment Violations

Based upon stipulations of the parties at the hearing, the Judge concluded that the seven violations cited had existed, that the required equipment was either in short supply or unavailable due to industry-wide demand for the equipment created by the then recent enactment and implementation of the Act, that Itmann was not negligent, that the violations were serious, and that Itmann exhibited good faith in abating the violations. As a result of these findings and consideration of the other statutory criteria of section 109(a) of the Act, the Judge assessed penalties in the amount of $230 for these seven violations.

C. The Section 302(a) Violation

Based upon the testimony of the issuing inspector and other evidence adduced at the hearing, the Judge concluded that an unsafe roof had existed as cited and constituted a violation of section 302(a) of the Act. After considering the six criteria of section 109(a) the Judge assessed a penalty of $1,000 for this violation.

Issues Presented

A. Whether Notices of Violation and Orders of Withdrawal alleging violations of section 304(a) of the Act are sufficient in themselves to support findings of violation when the issuing inspector is unable to remember the particular condition and can testify only generally as to the conditions which caused him to issue the citations.

B. Whether a proffer of purchase orders for required safety equipment dated prior to the date of issuance of Notices of Violations is sufficient to show that a violation did not exist based upon the unavailability doctrine enunciated in *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973).

Discussion

A.

In each of the seven citations alleging violations of section 304(a) of the Act, Itmann was cited for

accumulations of loose coal and coal dust or float coal dust for various distances. None of these citations included any indication of the depth of the alleged accumulation. At the hearing, the inspectors who issued the Notices and Orders in question were unable to testify as to the specific situations or circumstances which caused them to issue the respective citations. They had no present recollection of the conditions cited, but did testify that when they issued the citations under review they employed certain personal standards as a matter of practice by which they determined whether an illegal accumulation existed, and that they would not have issued the citations had the conditions cited not existed. The witness for Itmann, the superintendent of the mine involved, testified that he did not believe that the conditions cited constituted illegal accumulations, that Itmann had a regular cleanup program which was usually adequate to guard against such accumulations, that men were periodically assigned to clean up unusual accumulations, and that, in the case of the Orders of Withdrawal alleging violations of section 304(a), he did not consider the situation imminently dangerous. This evidence was unrefuted by the Mining Enforcement and Safety Administration (MESA).

[1] In *Armco Steel Corporation*, 2 IBMA 359, 362, 80 I.D. 790, 791, 1973-1974 OSHD par. 17,043 (1973), this Board stated:

> * * * The text of the notice itself is devoid of any indication of the depth and extent of the mass of combustible material, on the basis of which we could determine if there was an "accumulation" within the meaning of section 304 (a) of the Act. The inspector's remarks with regard to his allegedly unvarying inspection practices do not compensate for the deficiencies of the notice. * * * [H]is statements are entirely self-serving and do not really prove any precise condition. * * *

Itmann contended, and we agree, that *Armco*, *supra*, is applicable to all of the alleged section 304(a) violations here in issue. Since no standard has been established defining precisely under what circumstances an accumulation constitutes a violation of section 304(a), each case must be considered individually and decided on the basis of the evidence of record. In the instant case, the issuing inspectors' testimony that they were unable to recall the specific circumstaces surrounding the alleged violations and their testimony to the effect that they would not have issued the citations if the conditions had not existed are insufficient to support a finding by the Judge that MESA carried its burden of proving by a preponderance of the evidence that a violation occurred. Accordingly, we must reverse the Judge's decision and order insofar as it finds that the above violations occurred as cited, and set aside the penalties in the amount of $6,600 assessed by the Judge for these violations.

B.

In each of the seven Notices of Violation citing the lack of various pieces of safety equipment required by the Regulations, *i.e.*, approved methane detectors, visual disconnects for electrical equipment, and fire outlets and hose, Itmann stipulated that the Notices accurately reflected the condition in the mine at the time of inspection. MESA agreed "that the operator exercised good faith in abating the violation on the basis of the fact that they (sic) [the required equipment] were ordered before the time the violation was issued and the operator was not negligent in most all cases, since it was in advance of the time the notice was issued." (Tr. p. 211.)

On appeal Itmann contends that the Judge should have found that no violation existed in these instances because the equipment required to abate the alleged violations was unobtainable at that time.

In *Buffalo Mining Company*, *supra*, at 259, 80 I.D. 644, 1973–1974 OSHD par. 16,618 (1973), the Board concluded, "* * * that Congress did not intend that a section 104(b) notice be issued or a civil penalty assessed where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians." In that case, the record indicated that there was no dispute as to the fact of violation, but that the issuing inspector and the Safety Director for Buffalo both testified that the required material was unavailable both to the operator and the industry in general.

In *Associated Drilling, Inc.*, 3 IBMA 164, 173, 81 I.D. 285, 289, 1973–1974 OSHD par. 17,813 (1974), concerning a notice of violation written in June 1971, for the lack of an approved methane detector, testimony was elicited at the hearing to the effect that the Bureau of Mines had bought almost all the detectors available and that "[t]he market had used them up at some time during that period."

[2] The citations in *Buffalo*, and *Associated Drilling*, *supra*, and in the instant case were all issued between December 1970 and June 1971. It is apparent to the Board that during the period the Notices in question were issued, the mining industry was having great difficulty obtaining the equipment required by the Regulations. In the instant case, Itmann showed that all of the required equipment was on order prior to the issuance of the Notices in question, but that little, if any, of the ordered equipment had been delivered. In his finding the Judge stated that the required equipment was unavailable, thus Itmann was not negligent. We believe that the finding of unavailability negates a finding of violation and comes within the conclusions of law reached in *Buffalo Mining Company*, *supra*. On the basis of our review of the record and of the Judge's findings, we must conclude that these Notices should not have been issued since the required equipment was not available. Accord-

ingly, we reverse the Judge's decision and order, insofar as it finds that the violations occurred as alleged, and set aside the penalty assessment in the amount of $230 for these violations.

At the hearing, the inspector who issued *Order of Withdrawal No. 1 WVC, December 8, 1970*, had independent recollection of the roof conditions which led to the issuance of the Order alleging an unsafe roof. He testified that based upon his visual observation the roof appeared inadequately supported, and that loose, overhanging brows were present at several locations. Contrary to testimony of the inspector that the mine section involved was in production, witnesses for Itmann testified that the area was under construction for rehabilitation rather than in production and stated that the roof condition did not seem out of the ordinary, but that there were some overhanging brows to be taken down and more timbering to be done in this area before production commenced. These witnesses testified they believed that the fact that loose coal being cleaned up led the inspector to believe that the area was in production.

Although the issuing inspector and the witness for Itmann differed as to whether the area in question was in production and whether the roof condition was dangerous, we find there is sufficient evidence in the record to support the Judge's finding that the violation occurred as alleged. Our review also indicates that there is sufficient evidence to support the Judge's finding that this violation was serious due to the known danger of roof and rib falls. His finding that a prudent operator would have maintained safe roof and ribs and that Itmann was negligent in permitting the condition to exist likewise will not be disturbed. Finally, his findings of good faith abatement and lack of adverse effect upon Itmann's ability to continue in business are uncontested and are supported by the record. Accordingly, we affirm the Judge's finding of violation and penalty assessment of $1,000 therefor.

We note that on page 13 of his decision the Judge dismissed the charge of violation of section 304(a) contained in *Notice of Violation No. 1 JEK, December 4, 1970*, but then mistakenly assessed a penalty of $100 for that violation. Our review of the record reveals that the Judge's dismissal of the charge was proper. Consequently, we vacate this Notice of Violation, set aside this penalty assessment, and reduce the total penalty assessment by $100.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1) The five Notices of Violation of section 304(a) of the Act ARE VACATED and the respective penalty assessments therefor totaling $3,600 ARE SET ASIDE;

2) The citations of violation of section 304(a) of the Act contained in *Order of Withdrawal No. 1 WVC, December 8, 1970*, and *Order of Withdrawal No. 1 JEK, January 13, 1971*, ARE VACATED and the penalty assessments therefor in the total amount of $3,000 ARE SET ASIDE;

3) The seven Notices of Violation of 30 CFR 75.307-1, 75.808, and 75.-1100-2(b) ARE VACATED and their respective penalty assessments in the total amount of $230 ARE SET ASIDE;

4) *Notice of Violation No. 1 JEK, December 4, 1970*, IS VACATED and its penalty assessment of $100 IS SET ASIDE;

5) The penalty assessment of $1,-000 for the violation of section 302 (a) of the Act described in *Order of Withdrawal No. 1 WVC, December 8, 1970*, IS AFFIRMED; and

6) Itmann Coal Company pay a penalty assessment in the total amount of $1,600 on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

CANNELTON INDUSTRIES, INC.

4 IBMA 74

Decided *March 21, 1975*

Appeal by the Mining Enforcement and Safety Administration from a decision in Docket No. M 73-19 by Administrative Law Judge Charles C. Moore, Jr., granting relief sought in a Petition for Modification pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed in part, vacated in part.

1. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Diminution of Safety

Where an operator presents prima facie evidence in a section 301(c) proceeding proving that the application of a mandatory standard to a particular mine will result in a diminution of safety to the miners in such mine in the form of greatly increased prospects of roof fall, and its case prevails by a preponderance of the evidence over that presented by opposing parties, the modification may be granted.

2. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Publication

Pursuant to subsection (c) of section 301, notice of receipt of a petition for modification must be published in the *Federal Register*, but such publication requirement does not apply to issuance of an adjudicative decision.

APPEARANCES: John H. O'Donnell, Esq., Acting Assistant Solicitor, John P. McGeehan, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Charles Q. Gage, Esq., for appellee, Cannelton Industries, Inc.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Mining Enforcement and Safety Administration (MESA) appeals to the Board from a decision in Docket No. M 73-19 by Administrative Law Judge Charles C. Moore, Jr., granting modification of the application of section 314(f) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 874(f) (1970). Pursuant to section 301(c) of the Act, the Judge held that respondent Cannelton Industries, Inc. (Cannelton), proved by a preponderance of the evidence that the application of the subject mandatory standard to its Pocahontas Nos. 3 and 4 Mine[1] would result in a diminution of safety to the miners in that mine. 30 U.S.C. § 861(c) (1970). MESA contends that the Judge's conclusion is not supported by the record and that he erred in requiring his decision to be published pursuant to section 301(d). 30 U.S.C. § 861(d) (1970). Although we find merit in the latter argument, we are of the opinion that the Judge's findings and conclusions in other pertinent respects must be affirmed.

Factual and Procedural Background

Cannelton's Petition for Modification was filed in the Hearings Division on December 12, 1972. By this petition, Cannelton requested modification of the application of section 314(f) of the Act to its Pocahontas Nos. 3 and 4 Mine. 30 U.S.C. § 874(f) (1970). This section of the Act requires use of automatic couplers on haulage equipment.[2]

At the subject mine, coal is hauled from a working face in off-track shuttle cars to a conveyor belt. The belt conveys the coal to a central loading point on a track loop where it is dumped into one of several available, coupled, mine cars.

By means of mine locomotives, the loaded mine cars are pushed and pulled over the main track haulage to a vertical shaft, 151 inches in width, up which each loaded car is hoisted 250 feet, dumped, and then returned to the bottom. Curves along the main track haulage are sharp and the turn radius is as small as 30 feet in some instances.

The mine cars, including their bumpers, are 139 inches in length. Bumpers are affixed to each end of a mine car, approximately at the level of the wheel axle. When the bumpers of two cars are flush against each other, their is a space of approximately 18 inches between the car bodies.

[1] The numbers 3 and 4 refer to the two shafts which comprise the Pocahontas Mine.

[2] Section 314(f), 30 CFR 75.1405, provides as follows: "All haulage equipment acquired by an operator of a coal mine on or after one year after the operative date of this title shall be equipped with automatic couplers which couple by impact and uncouple without the necessity of persons going between the ends of such equipment. All haulage equipment without automatic couplers in use in a mine on the operative date of this title shall also be so equipped within four years after the operative date of this title."

The coupling system in use in the subject mine is of the link-pin variety and consists of a heavy metal pin and linked chain, positioned respectively, in the center of the end of a mine car. Coupling or uncoupling is accomplished by reaching between stationary cars and manually dropping or lifting the pin, as appropriate, through one of the links.

On February 2, 1973, MESA filed an Answer neither admitting nor denying Cannelton's allegations on account of insufficient knowledge. MESA indicated that a further pleading would be forthcoming after completion of an investigation.

On February 13, 1973, notice of the subject petition was published in the *Federal Register*, 38 FR 4354. The United Mine Workers of America (UMWA) subsequently filed an Answer in opposition to the petition.

On September 14, 1973, MESA submitted an amended Answer denying the allegations in Cannelton's petition. Attached to the amended Answer was a report of MESA's investigation.

A hearing before an Administrative Law Judge took place on January 22, 1974, at which time all parties appeared except the UMWA. On March 8, 1974, the Judge ruled favorably on Cannelton's petition, and on March 28, 1974, MESA filed a timely Notice of Appeal with the Board. By order dated June 19, 1974, the Board granted a motion by Cannelton to schedule oral argument. Following receipt of the briefs, the argument took place before the Board on June 28, 1974.

Issues on Appeal

A. Whether the Administrative Law Judge's conclusion that application of section 314(f) of the Act to the subject mine would result in a diminution of safety is supported by the evidence of record.

B. Whether the provisions of subsection (d) of section 301, 30 U.S.C. § 861(d) (1970), requiring publication in the *Federal Register*, are applicable to a decision issued pursuant to subsection (c).

Discussion

A.

[1] In the case at hand, the Judge ultimately concluded as a matter of law: "Petitioner has established, by the preponderance of this evidence that the application of the standard in question to its mine (Pocahontas 3 and 4) 'will result in a diminution of safety to the miners in such mine,' and is accordingly entitled to modification of the application of the standard."[3] *Dec.* 7. MESA attacks this conclusion in several ways. First, it argues that Cannelton failed to establish a prima facie case of diminution of

[3] In its Petition for Modification, Cannelton did not allege that the application of section 314(f) "* * * will result in a diminution of safety * * *" at the subject mine. When evidence as to this claim emerged at the hearing, MESA did not make a timely objection on the ground of immateriality and it now recognizes that the failure to do so constituted a waiver. Br. of MESA, p. 7, n. 3. *Compare Zeigler Coal Co.*, 3 IBMA 448, 81 I.D. 729, 1974-1975 OSHD par. 19,131 (1974).

safety.[4] Second, it submits that Cannelton's case did not preponderate over its evidentiary presentation. Next it contends that even assuming *arguendo* that Cannelton established a prima facie case, and further, that the evidence is in equipoise, MESA is entitled to judgment by virtue of the Secretary's burden of proof regulation, 43 CFR 4.587. Lastly, it assigns as error the failure of the Judge to sustain an objection to the admission of evidence of financial hardship.[5]

With respect to the first contention concerning the prima facie requirement, we note at the outset that a party, which is assigned the initial burden of going forward, satisfies such requirement when it adduces persuasive evidence: (1) sufficient to force an opposing party to go forward with rebuttal evidence; and (2) sufficient to support favorable findings of fact and conclusions of law. *Armco Steel Corp.*, 2 IBMA 359, 80 I.D. 790, 1973-1974 OSHD par. 17,043 (1973). The failure to establish a prima facie case is, of course, fatal.

In the case at hand, the Judge did not discuss whether the record contained prima facie evidence although a finding to that effect is implicit. In reaching his decision, he relied principally on the testimony of Mr. Robert C. Miser, Cannelton's chief engineer.

Mr. Miser pointed out that conversion of the present mine cars to automatic couplers would increase the overall length by 17 inches to a total of 156 inches (Tr. 124–6). Inasmuch as the current width of the shaft is 151 inches, widening would be essential. Such a project would entail blasting hazards and shaft problems due to replacement of structural support (Tr. 128–9). Another consequence of the additional length would be extensive alteration of the track haulage system because a number of the curves have a radius of 30 to 35 feet and another 10 to 15 feet would be required to accommodate the modified cars (Pet. Ex. 4). In order to increase the radius of the curves, it would be necessary to drive through portions of the principal roof support—pillars of coal (Tr. 134–5). In so doing, the chances of roof fall would, according to Mr. Miser, greatly increase. In specifically relying on the foregoing, the Judge indicated that he found Mr. Miser to be a credible expert witness. In our view, this evidence was sufficiently reliable, probative, and substantial to support findings of fact

[4] MESA has mischaracterized this issue as a burden of proof problem calling for the application of 43 CFR 4.587. We have stated before and we repeat again that the Secretary's burden of proof regulation applies *only* in instances where the evidence is in equipoise with respect to a disputed crucial element of proof.

[5] In addition, MESA argues that the evidence was insufficient to grant modification on the alternative ground stated by Cannelton, namely, that it had an alternative which would achieve the same measure of protection for miners as that which is afforded by section 314(f) of the Act. However, the Judge reached no ultimate conclusion as to this claim, and we need not go into it ourselves or remand because we can finally dispose of this appeal on other grounds. Further, we observe in passing that MESA has neither pleaded, nor proved, nor contended on appeal that the modification should be denied whether or not Cannelton established a prima facie case of diminution of safety and preponderated.

and conclusions of law to the effect that installation of automatic couplers would result in greatly increased chances for a roof fall. Thus, we conclude that Cannelton did establish a prima facie case of diminution of safety to the miners in the subject mine by application of the subject standard.

When we turn to MESA's rebuttal presentation in order to determine who preponderated, we find corroboration of Cannelton's case. MESA does not dispute that the mine cars would have to be lengthened by the addition of automatic couplers and that such lengthening would necessitate alteration of the shaft and of the track curves which would in turn cause roof control problems in a mine which, up to now, has had a sound roof. Indeed, MESA's inspector, Mr. John H. Cook, admitted as much (Tr. 212, 237–38, 356–7; Br. of MESA, p. 13, n. 7, 16–17). MESA simply states that it is confident that Cannelton will continue to have a sound roof control program and argues that Cannelton has not proved that there would be a substantial likelihood of increased incidence of roof falls.

Thus, the area of dispute comes down to whether the likelihood of roof falls, if alteration were required, is a realistic probability or little more than a speculative possibility. The Judge accepted the opinion of Mr. Miser, and MESA has not pointed to any evidence to contradict that judgment. In this instance, the weight given to the opinion of Mr. Miser by the Judge is buttressed by the natural inference to be drawn from undisputed basic facts. The alteration contemplated would undoubtedly weaken existing roof support. We are inclined in this circumstance to infer an increased prospect of roof falls when nothing concrete is presented to show that the problem is *de minimis* or that specific measures can be taken which will minimize the likelihood of such disasters. All that MESA has presented with respect to this issue is argument and we believe that the Judge acted within his fact finding discretion in discounting it. Accordingly, we hold that the Judge correctly ruled that Cannelton proved by a preponderance of the evidence that application of section 314(f) to the subject mine "* * * will result in a diminution of safety to the miners in such mine."

Having concluded that Cannelton preponderated, we need not consider which party to the subject modification proceeding has the burden of proof and must bear the risk of non-persuasion with respect to any of the elements of proof under 43 CFR 4.587. *Eastern Associated Coal Corp.*, 3 IBMA 331, 341–2, 81 I.D. 567, 1974–1975 OSHD par. 18, 706 (1974).

We come then to MESA's remaining substantive attack on the decision below. At the hearing, one Thomas Hazzard, a mine car coupler at the subject mine, testified as to the economic hardship which employees would suffer if the mine were closed in order to install auto-

matic couplers or if it closed down permanently (Tr. 274–5). This evidence was received over MESA's timely objection on the ground of irrelevancy.[6] Although the Judge did not formally rule upon this objection, his reference to the disputed testimony in his opinion indicates to us that he overruled it *sub silentio*.

In our view, MESA's objection was well-taken. Evidence of economic hardship to employees or employers is irrelevant both as a matter of logic and law to a determination as to whether the application of a mandatory standard will result in a diminution of safety. Therefore, the Judge should have sustained the objection and entertained a motion to strike. 5 U.S.C. § 556(d) (1970).

However, we do not believe that reversal is called for in this instance because the error was not prejudicial to MESA. As noted earlier, there is ample independent and relevant evidence in the record, considered as a whole, to support the Judge's conclusion that the application of section 314(f) of the Act to the subject mine would result in a diminution of safety. Accordingly, we conclude that the erroneous ruling provides no basis to overturn the decision below.

[6] MESA also objected on the ground that the union local, whose views Mr. Hazzard purported to represent, was not and could not be a party to the instant proceeding. We are of the view that this objection was without merit because Mr. Hazzard testified as a witness for Cannelton and did not seek recognition as an "interested party." 30 U.S.C. § 861(c) (1970); 43 CFR 4.507(b), 4.513, 4.552.

B.

[2] We turn now to the remaining issue in this appeal, namely, the applicability, if any, of the publication requirement contained in subsection (d) of section 301 of the Act to a decision issued pursuant to subsection (c). Subsection (d) provides as follows:

> (d) In any case where the provisions of sections 302 to 318, inclusive, of this title provide that certain actions, conditions, or requirements shall be carried out as prescribed by the Secretary, or the Secretary of Health, Education, and Welfare, as appropriate, the provisions of section 553 of title 5 of the United States Code shall apply unless either Secretary otherwise provides. Before granting any exception to a mandatory safety standard as authorized by this title, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected coal mine.

A comparison of the two subsections reveals that they involve entirely different procedural processes which are mutually exclusive. Subsection (c) concerns modification of the application of a mandatory standard to a particular mine. The Congress directed that the procedure to be employed by the Secretary in considering modification petitions was to be adjudicative, hence the citation of 5 U.S.C. § 554 (1970). By contrast, subsection (d) deals with changes in mandatory standards to be effected by rulemaking or by the application of administrative exceptions. Where either of these methods is em-

ployed, we believe that Congress intended the findings of the Secretary or his authorized representative to be made public by publication in the *Federal Register*. In this connection, we note the reference in subsection (d) to 5 U.S.C. § 553 (1970), the rulemaking provision of the Administrative Procedure Act.

In addition, we observe that subsection (c) contains a limited publication requirement applicable only to notice of receipt of a Petition for Modification. Two inferences can be drawn from this extraordinary and quite specific requirement. First, since the Congress attached the publication requirement to an expressly mentioned phase of the adjudicative process, it impliedly excluded other phases not so mentioned.[7] Second, the Congress was well aware that a publication requirement is *not* usually applied to phases of the adjudicative process, and it must have realized that an explicit expression of legislative intent was necessary in order to create an exception to the prevailing practice. *See* 5 U.S.C. § 554 (1970). It follows that if the Congress recognized the necessity of legislating an express exception with respect to publication in the *Federal Register* of a notice of receipt of a petition filed pursuant to subsection (c) of section 301, then it would have so legislated with respect to the publication in the *Federal Register* of an adjudicative decision under that subsection if it intended a wider exception. Since the Congress failed to do so, we conclude that the legislators did not in fact create a more inclusive exception.

Accordingly, we are of the view that the Judge erred in ordering publication of his decision in the *Federal Register* and that his order to that effect must be vacated.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision in the above-captioned docket IS AFFIRMED, except that the order requiring publication of the decision in the *Federal Register* IS VACATED.

DAVID DOANE,
Administrative Judge.

WE CONCUR:
C. E. ROGERS, JR.,
Chief Administrative Judge.
HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

[7] *Expressio unius est exclusio alterius. Compare Kings Station Coal Corp.*, 2 IBMA 291, 80 I.D. 711, 1973-1974 OSHD par. 16,879 (1973) *with North American Coal Corp.*, 3 IBMA 93, 117, n. 16, 81 I.D. 204, 1974-1975 OSHD par. 17,658 (1974).

ESTATE OF JOHN J. AKERS

3 IBIA 300

Decided *March 26, 1975*

Decision and Remand with Orders implementing the judgment of the Ninth Circuit Court and the prior orders of the Board of Indian Appeals.

Order.

1. Indian Probate: Secretary's Authority: Jurisdiction of the Courts—381.1

The Secretary is bound by the order of a court only as to those issues and as to those individuals before the court.

2. Indian Probate: Secretary's Authority: Jurisdiction of the Courts—381.1

Where issues are decided by the Secretary which do not become the subject of litigation, the Secretary's decision is final as to those issues not litigated.

APPEARANCES: For appellant, Gerald J. Neely of Towe, Neely & Ball, Billings, Montana. For appellee, Hubert J. Massman of Helena, Montana.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

This matter is before the Board for the implementation of the judgment in *Dolly Cusker Akers* v. *Rogers C. B. Morton, et al.* (CA 9th Cir. No. 71-3002) 499 F.2d 44 (9th Cir. 1974) upon receipt of the communication of March 4, 1975, to the Solicitor, Department of the Interior, from Mr. Herbert Pittle, Assistant Attorney General, Land and Natural Resources Division,

Re: *Dolly Cusker Akers* v. *Rogers C. B. Morton, et al.*, * * * the time for certiorari in the above-entitled action has expired.

Accordingly, nothing further remains to be done and this file is being closed.

[1] The Ninth Circuit Court considered only two of the various issues raised in the appeal from the District Court, *i.e.* (1) the correctness of the Departmental approval of the testator's will dated December 5, 1957, and (2), the denial of the applicability of the Statutes of Montana creating dower rights in a widow. The Circuit Court affirmed the District Court approval of the Departmental ruling on both. Upon the failure of the widow to pursue appellate procedures the case stands finally decided by the Circuit Court, and the Department is affirmed in its disposition of the two issues raised, *supra.*

[2] Those issues raised in the course of probate of this estate which have not been before the courts involve the allowance of and priority of payment of two of the four claims filed. No dispute was raised as to the allowance and payment of the probate fee and the claim for irrigation. The allowance of a claim of the Internal Revenue Service against both the widow, Dolly Cusker Akers, and this Estate was finally decided for the Department by this Board in 1 IBIA 246, 79 I.D. 404 (1972). The Internal Revenue claim was authorized to be paid from income only and not from sale of any trust land. In that same decision, a claim against the Estate for attorney's fees by Mr. Hubert J. Massman who had represented the devisee as the proponent of the decedent's will was disallowed as not being chargeable against the Estate. It was held that he represented his

client only in this case, and that his fees were her cost, and not a cost of administration to be paid from Estate assets.

The Board's decision of May 24, 1972, *supra*, was not challenged in the courts and is therefore final for the Department. The Court record shows that on October 5, 1971, Dolly Akers filed an appeal in the Ninth Circuit Court seeking reversal of the District Court's approval of the will and its denial of dower. The appeal was dismissed "* * * for want of prosecution * * *" by order of the Court filed May 3, 1972. The Board's decision was entered May 24, 1972, on the separate issues of the allowance of the claim of Internal Revenue and both the allowance and priority of the claim for attorney's fees on a date when no proceeding was pending in any court. The record further shows that upon appellant's motion of June 15, 1972, the appeal was reinstated by the Court on June 29, 1972, and that the issues before the Court were finally decided June 20, 1974.

It is the conclusion of this Board that the orders entered in *Estate of John J. Akers*, Docket 70–9, 1 IBIA 246, 79 I.D. 404 (1972), continued in effect and should be reaffirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2) the decision of the Board, 1 IBIA 246, 79 I.D. 404 (1972), in the Estate herein shall be, and the same is HEREBY REAFFIRMED, and the Superintendent shall:

A. Distribute all cash funds in the Individual Indian Money account:

1. in payment of the probate fee of $75; and

2. in payment of the irrigation claim of $310; and

3. the balance of the fund shall be paid toward satisfaction of the Internal Revenue claim and the Superintendent shall pay any future income accruing to the estate until the debt be satisfied.

B. Deliver to Hazel Trinder, in accordance with the will of John Akers, the trust lands which form the residue of John Akers' estate.

IT IS FURTHER ORDERED, that this matter shall be and the same is HEREBY REMANDED to the Administrative Law Judge having probate jurisdiction at the Fort Peck Reservation with authority to issue any and all orders necessary to implement the judgment of the Court and the decisions and orders of this Board.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

ZEIGLER COAL COMPANY

4 IBMA 88

Decided *March 31, 1975*

Appeal by the Mining Enforcement and Safety Administration from a decision of Administrative Law Judge Edmund M. Sweeney, wherein he vacated an Order of Withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969, and vacated as well any previously proposed civil penalty assessment for an alleged violation of 30 CFR 75.200 arising out of said withdrawal order, in consolidated proceedings involving Docket Nos. VINC 72-66 and VINC 73-228-P/1.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Scope of Review

Where an Administrative Law Judge erroneously finds the evidence of record to be in equipoise with respect to all disputed elements of proof, the Interior Board of Mine Operations Appeals may make its own findings from the record determining the preponderant weight of the evidence. 43 CFR 4.605.

2. Federal Coal Mine Health and Safety Act of 1969: Evidence: Prima Facie Case

Withdrawal orders and assessments of civil penalties are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. § 556(d) (1970)) and may be imposed only if the Government produces reliable, probative, and substantial evidence, that is to say, establishes a *prima facie* case.

3. Federal Coal Mine Health and Safety Act of 1969: Burden of Proof

The Secretary's burden of proof regulation, 43 CFR 4.587, does not govern the order of proof or the obligation to establish a *prima facie* case. Such regulation applies only to the determination of which party loses in whole or in part, as appropriate, where the evidence is in equipoise with respect to an element or elements of proof in dispute.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and Robert J. Phares, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; J. Halbert Woods, Esq., for appellee, Zeigler Coal Company.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On April 13, 1972, Mr. Harry Greiner, a federal coal mine inspector, employed by the Mining Enforcement and Safety Administration (MESA), issued an imminent danger withdrawal order pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the Act) [1] against Zeigler Coal Company (Zeigler) at its No. 4 Mine. That order, designated as 1 HG, April 13, 1972, contained the following citation:

Dangerous roof conditions exist for a distance of 300 feet over the man trip and material haulway in No. 5 Southeast entry, where men and material were being

[1] 30 U.S.C. § 814(a) (1970).

transported in open top S and S Cars and open supply cars. This area had also been dangered off by the mine examiner on April 7, 1972, and danger sign had been ignored in traveling this travelway.

The area of the mine subject to the order was described as "No. 5 Southeast entry from the mouth of entry inby for a distance of 300 feet." The order was terminated at 5:45 p.m. on April 14 with the action taken to justify the termination described as follows:

Loose roof was taken down and an additional 125 to 130 five foot roof bolts were installed in No. 5 Southeast entry to make the roof safe for travel.

The pertinent mandatory safety standard is 30 CFR 75.200, and provides in relevant part as follows:

* * * The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. * * *

The proceeding in Docket No. VINC 72-66 was commenced on May 8, 1972, when Zeigler filed its Application for Review of the subject imminent danger order. The proceeding under Docket No. VINC 73-228-P/1 was commenced when Zeigler, on February 19, 1973, filed a petition for hearing and formal adjudication with regard to the proposed order of assessment issued by MESA on February 1, 1973, proposing a penalty assessment of $8,500 for an alleged violation of 30 CFR 75.200 arising from the condition cited in the subject withdrawal order. In its pleadings, Zeigler denied: that the roof was unsafe; that there was any imminent danger; that there was any violation of Zeigler's roof control plan; that there was any violation of the regulations; that the roadway had been dangered off; and that danger signs had been ignored in traveling the roadway.

A hearing on the Application for Review was held on November 29, 1973, in Arlington, Virginia. At the conclusion of the hearing counsel for Zeigler advised the Administrative Law Judge (Judge) of the pendency of the section 109(a) civil penalty proceeding. The Judge then, on November 30, 1973, issued an Order to Show Cause why the evidence adduced at the hearing on the Application for Review should not be adopted and incorporated into the record of the civil penalty proceeding and thus eliminate the necessity for an additional public hearing. MESA responded to the Show Cause Order by alleging that it would be seriously prejudiced if no hearing were held in the civil penalty proceeding because it would be precluded from questioning witnesses with regard to the statutory criteria required to be considered in fixing the appropriate amount of civil penalty. As a consequence, a second hearing was held January 21, 1974, at Chicago, Illinois, where the Judge ordered the two proceedings consolidated.

As a result of the evidence adduced at these hearings, Administrative Law Judge Edmund M. Sweeney concluded that the condition of the roof cited in the order

could not be determined because of extensive conflicts in the testimony. He then determined that the testimony of the witness for both sides was incredible, that neither side preponderated, and that, therefore, the ultimate decision rested upon the appropriate application of the burden of proof. He considered the case to be one in which the order of withdrawal was proper if and only if a violation of the above-quoted portion of 30 CFR 75.200 occurred (Dec. 6). He reasoned that the burden was on MESA to prove the violation whenever the facts constituting the violation are necessarily the basis of proof of imminent danger and are therefore necessarily the issue in the case (Dec. 17). Finding that MESA had failed to prove a violation of 30 CFR 75.200, the Judge vacated the order of withdrawal as well as the proposed assessment for the alleged violation.

MESA contends on appeal that the order of withdrawal was properly issued and that the Judge failed to reach this conclusion because he applied the wrong legal criteria to the evidence and misallocated the burden of proof. MESA also contends that it proved a violation of 30 CFR 75.200.

Zeigler contends that the Judge did not err in his evaluation of the evidence and allocation of the burden of proof, and that he properly vacated the order.

The National Independent Coal Operator's Association (NICOA) has filed an *amicus curiae* brief devoted to the burden of proof issue. It contends that in this and similar cases the burden is properly placed on MESA.

Issues

A.

Whether the Administrative Law Judge correctly vacated Order of Withdrawal 1 HG, April 13, 1972, and properly found that the alleged violation of 30 CFR 75.200 was not proved.

B.

Whether the Administrative Law Judge properly evaluated the evidence in this case, made the appropriate conclusions of law, and properly applied the burden of proof regulation, 43 CFR 4.587.

Discussion

We concur with the Judge as to the results reached in his decision. We believe that he was correct in vacating Order of Withdrawal 1 HG, April 13, 1972, and in concluding that MESA failed to prove the alleged violation of 30 CFR 75.200. However, we do not agree that conflicts of testimony preclude a determination as to which party preponderated with respect to the weight of the evidence. Indeed, after extensive review of the entire record, we find that the evidence adduced by the operator clearly preponderated over that adduced by MESA and we conclude that where there is a preponderance by one side, application

of the burden of proof regulation, 43 CFR 4.587, is not needed.

[1] In the circumstances of this case, we find it necessary to exercise our prerogatives under 43 CFR 4.605 and to make our own findings of fact, some of which coincide with and others of which differ from the findings made by the Judge. We believe that the record shows and we therefore find: that between 9 p.m. April 6, 1972, and 4 p.m. Friday, April 7, 1972, a roof fall occurred at the mouth of the 5th Southeast entry of the Zeigler No. 4 Mine; that the mine's preshift examination records contained entries between the dates of April 6, 1972, and April 12, 1972, showing "*Loose top mouth of 6th SE*" and "*Loose rock at mouth of 5th S.east*" (Italics supplied); that the approximately 300 feet in-by the mouth of the 5th Southeast entry is part of the 6th Southeast supply road for such mines; that the roof fall extended partially across the intersection of the 5th Southeast entry with the crosscut from the 4th Southeast entry; that the supply road was normally used for both hauling supplies and men; that the portion of the fall over the roadway was cleaned up and some roof bolts installed between midnight and eight o'clock a.m. on April 10; that on April 13, 1972, Federal Coal Mine Inspector Greiner went to the Zeigler No. 4 Mine to conduct a spot inspection; that Inspector Greiner checked preshift examination books and erroneously formed the impression therefrom that the 5th Southeast entry had been marked out as having an unsafe condition from April 7 through the 13th inclusive; that Inspector Greiner went underground where he came upon the intersection where the fall had occurred at the mouth of the 5th Southeast entry and discovered a danger board which had been previously placed there by the company's preshift inspectors to danger off the area extending beyond the intersection and not used in the travelway of the 5th Southeast entry; that Inspector Greiner advised Mr. Stanton Roberts, Zeigler's Mine Safety Director, that an order of withdrawal would issue for the 300 feet because the roof was dangerous and placed danger signs at both ends of the 300 foot area; that between 9 and 11 a.m. a written order of withdrawal No. 1 HG, April 13, 1972, was issued for the 300-foot area; that the order of withdrawal did not include or refer to the area of the roof fall; that the approved roof bolting plan for the entry was being followed; that the roof consisted of white rock or gray shale; that between 4 o'clock p.m. and midnight on April 13, 1972, the entire roof in the area of the fall was rebolted, no loose roof taken down and approximately 33 five-foot bolts were installed in the roof fall area and the 300-foot area which had previously been closed by the order of withdrawal; that Inspector Greiner again accompanied by Mr. Roberts re-inspected the area on April 14, 1972, and terminated the order of withdrawal at 5:45 p.m. We further

find that Inspector Greiner confused the preshift examiner's notations on the roof fall as being notations on the roof conditions in the 300-foot span of the 5th Southeast entry and further that Inspector Greiner issued the section 104(a) withdrawal order on the erroneous assumption that the notation found in the preshift examination records and the danger boards found underground concerned the 300-foot roadway in the 5th Southeast entry.

At the hearing, when Inspector Greiner was asked why he issued the withdrawal order, he stated:

> In the first place I saw it written up on pre-shift books, and I went to this area to check it out, and when I got on the mantrip, the mantrip travels this roadway, and when I got there, there was a danger board across the road and I examined the area by testing and looking and sounding, and, in my judgment, it was bad, so I issued an order.

(Tr. II, p. 45.)

Inspector Greiner, who was accepted as qualified to give expert testimony on coal mine health and safety matters, asserted consistently that, in his judgment, the roof of the 300-foot inby the mouth of 5th Southeast entry of the subject mine was bad and unsafe. On the other hand, as Judge Sweeney observed, the Mine Safety Director, Mr. Roberts, and the two company mine examiners, Mr. Walden and Mr. Carter (all of whom were members of the union with as much or more experience in coal mining as Inspector Greiner, and all of whom were equally accepted by Judge Sweeney as qualified to give expert testimony on coal mine health and safety matters) uniformly asserted that the roof in the 5th Southeast entry "was safe, properly supported, and posed no danger to anyone." (Dec. 7.)

Inspector Greiner mistakenly thought that the notations in the preshift examination records referred to the roadway in the 5th Southeast entry as indicated on page 131 of Tr. I, as follows:

> Q. Was there anything in that record to indicate that that was in an area that was used as a roadway, travelway or working place?
>
> A. Yes sir, it said bad top over the roadway in the 5th southeast entry or gravelway—it could have been travelway.

The record shows that Inspector Greiner insisted that the preshift examination records introduced into evidence were incomplete and that the notations that he had confused and which he thought he remembered simply were not included in the exhibits. However, Judge Sweeney found, and we concur in that finding, that the preshift examination records submitted in evidence as Exhibit P–5 are the total and complete record of the preshift examinations made for the 6th Southeast supply road which is the same as the 5th Southeast entry, from April 6, 1972 to April 13, 1972, inclusive. In view of the foregoing discussion of the evidence, we have little difficulty finding, and we do find, that the weight of the evidence clearly preponderated in favor of the operator and that the roof of the 300-foot span of the 5th Southeast entry in the subject mine on April

13, 1973, was supported and adequately controlled to protect persons from falls.

Because of the apparent confusion over the application of the burden of proof rule, 43 CFR 4.587, we deem it advisable to clarify the Board's position with respect thereto. Section 7(d) of the Administrative Procedure Act (5 U.S.C. § 556(d)) provides, among other things, as follows:

> * * * A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. * * *

[2] We construe a withdrawal order issued or civil penalty assessed under the Act as constituting an imposition by the Government of a *sanction* of the kind contemplated in the above-quoted language of the APA. This provision requires the Government to base such sanctions only upon reliable, probative and substantial evidence. To us, this means that MESA must bear the burden of making out a *prima facie* case in a proceeding brought under the Act involving a withdrawal order or a violation of a mandatory health or safety standard for which a civil penalty is sought to be assessed.

The obligation of establishing a *prima facie* case is not the same as bearing the burden of proof. The regulation governing the burden of proof in our proceedings is 43 CFR 4.587, which provides as follows:

> In proceedings brought under the Act, the applicant, petitioner or other party initiating the proceedings shall have the burden of proving his case by a preponderance of the evidence provided that (a) in a penalty proceeding the Mine [sic] Enforcement and Safety Administration shall have the burden of proving its case by a preponderance of the evidence, and (b) wherever the violation of a mandatory health and safety standard is an issue the Mining Enforcement and Safety Administrator [sic] shall have the burden of proving the violation by a preponderance of the evidence.

[3] Applying a well-known rule of statutory construction to 5 U.S.C. § 556(d) and to 43 CFR 4.587,[2] we believe we are compelled to give a narrow construction to the regulation. We believe that although that regulation places the *ultimate* burden of proof on the operator in a review proceeding involving an imminent danger withdrawal order, such regulation nonetheless does not relieve MESA from the statutory obligation of making out a *prima facie* case in the first place. If, after MESA establishes a *prima facie* case, the operator fails to overcome MESA's case by a preponderance of the evidence with respect to each element of proof in dispute, then, MESA prevails and the operator's request for relief must be denied. The same result would apply, by virtue of 43 CFR 4.587, if the trier of fact should determine that the evidence

[2] A statute and a regulation *in pari materia*, although in apparent conflict, are so far as reasonably possible to be construed so that they are in harmony with each other and so that effect is given to every provision of each. See Sutherland, *Statutes and Statutory Construction*, § 5201 (4th Ed. 1974).

is equally favorable to both parties —or in equipoise—as to each of the elements of proof in dispute.[3]

On the other hand, since MESA has the burden of proof where the violation of a mandatory health or safety standard is in issue, it must not only establish a *prima facie* case under the APA in a penalty proceeding, but, under the regulation, it must also preponderate over any rebutting evidence adduced by the operator in order to prevail.[4]

Evidence in equipoise is rarely experienced in adversary proceedings. Normally, a trier of fact, by carefully weighing the evidence presented, will be able to determine that one party or the other preponderated with respect to each of the elements of proof in dispute.

This discussion merely reaffirms, though perhaps more explicitly, the same position expressed by the Board in prior cases. *See, e.g., Eastern Associated Coal Corp.*, 3 IBMA 331, 341–2, 81 I.D. 567, 1974–1975 OSHD par. 18,706 (1974) and *Cannelton Industries, Inc.*, 4 IBMA 74, 80, n. 4, 83 (1975).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of Interior (43 CFR 4.1(4)), IT IS ORDERED that the decision of the Administrative Law Judge rendered in the above-captioned dockets, IS HEREBY AFFIRMED AS MODIFIED for the reasons stated in this opinion.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

[3] The determination as to whether the Government presents a *prima facie* case and preponderates must be separately made with respect to each element of proof. It is conceivable that the trier of fact may find the evidence in equipoise with respect to only one element of proof. If so, the Judge need only apply 43 CFR 4.587 with respect to that one element in order to determine which party ultimately prevails with respect to such element.

[4] In penalty cases, the Government's statutory obligation to establish a *prima facie* case is limited only to establishing the existence of a violation. Such obligation does not relate to affirmative defenses, especially as they concern claims of mitigation based upon the criteria for assessing a penalty, once it is determined that a violation occurred.

U.S. GOVERNMENT PRINTING OFFICE: 1975

ADMINISTRATIVE APPEAL OF ROY T. MOBLEY

v.

COMMISSIONER OF INDIAN AFFAIRS AND JICARILLA APACHE TRIBE

4 IBIA 1

Decided *April 4, 1975*

Appeal from an administrative decision denying claims for professional services rendered.

Reversed in part and affirmed in part.

1. Indian Tribes: Attorneys: Fees

In the absence of an approved contract as required by 25 U.S.C. § 476 (1970), fees for legal services allegedly performed during the interim will not be allowed.

APPEARANCES: Kenneth Simon of Taylor, Ferencz and Simon, for appellant, Roy T. Mobley; Solicitor, Division of Indian Affairs, Department of the Interior for Commissioner, Bureau of Indian Affairs; and Nordhaus, Moses and Dunn, for the Jicarilla Apache Tribe.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before this forum on an appeal by Roy T. Mobley, hereinafter referred to as appellant, through his attorney, Kenneth Simon of the law firm of Taylor, Ferencz and Simon, from a decision of the Commissioner of Indian Affairs dated May 13, 1974, affirming the Albuquerque Area Director's decision denying appellant's claims for legal services.

The dispute centers around appellant's claims totaling $6,265.10 for attorney fees and expenses for services performed for the Jicarilla Apache Tribe, hereinafter referred to as Tribe, during the years 1958, 1959, and 1960. The total claim is broken down into the following three categories:

(1) $1,303.12 is claimed for services for the period January 1, 1958, to June 7, 1960, in resisting efforts of Neil S. Stull to have certain lands removed from the jurisdiction of the Tribe and to obtain oil and gas leases thereon.

(2) $2,331.25 is claimed for special services rendered to the Tribe during the period January 16, 1959, to November 30, 1960, to obtain a permit from the Federal Communications Commission to operate a television booster station.

(3) $2,161.20 in fees and $469.53 for expenses is claimed for general counsel services provided the Tribe for the period April 1, 1960, through December 20, 1960.

The record indicates appellant under dates of August 4, 1960, and June 7, 1961, submitted itemized vouchers in support of his claims to

579-465—75——1

the Bureau of Indian Affairs for consideration and payment. The record does not indicate that any definitive action was taken on the vouchers at that time. The record indicates that it was not until December 1, 1972, that any action was taken on the claims. No explanation appears in the record for the long interim delay.

For the first time, in response to a letter dated August 2, 1972, from appellant's counsel, the Area Director of the Albuquerque office of the Bureau of Indian Affairs on December 1, 1972, finally took action on the appellant's claims. The Area Director on that date denied all categories of appellant's claims.

The Area Director denied category (1) of the claims on the grounds that there was no agreement for additional compensation for work on the Stull claim and that appellant's report covering his work for the Tribe for the period in question did not appear to reflect any court proceedings in the matter.

Category (2) of the claims was denied by the Area Director on the grounds that it involved a matter which was neither a case to be litigated in court nor was it in the nature of a court proceeding.

Category (3) was denied by the Area Director on the grounds that appellant's general counsel contract with the Tribe was not effective for the period April 1, 1960, to December 20, 1960.

On February 1, 1973, the Area Director, acting on the appellant's December 21, 1972 request for reconsideration, reaffirmed his decision of December 1, 1972.

The appellant on February 8, 1973, appealed to the Commissioner from the Area Director's decision. The Acting Deputy Commissioner of Indian Affairs on May 13, 1974, affirmed the Area Director's decision as to all three categories by denying the same.

In support of his denial, the Acting Deputy Commissioner concluded (a) that the Stull claim (Category 1) was not handled in the nature of a court proceeding; (b) that the television booster claim (Category 2), although the nature of employment seemed to qualify for additional compensation under appellant's general counsel contract with the Tribe, could not be paid because appellant had not sought to reach agreement with the Tribe as to the amount to be paid for the service rendered; and (c) that the general counsel fees and expenses for April 1, 1960, through December 20, 1960, could not be paid because there was no effective general counsel contract for the period. In addition to the foregoing conclusions, the Acting Deputy Commissioner referred to the statute of limitations for the State of New Mexico but disposed of the appeal without regard to its possible effect. However, subsequently, the Commissioner concurred with the Tribe in its position that the appellant's claims were barred by the six (6)

year statute of limitations provisions of sections 23–1–1 and 23–1–3, New Mexico statutes annotated (1953 compilation).

The appellant in support of his appeal contends:

(1) that from January 1, 1958, to June 7, 1960, he performed services in the Stull matter (Category 1 of claims) and the television booster station matter (Category 2 of the claims) for which he is entitled to receive additional compensation to the $250 per month retainer allowed to him by the Tribe as general counsel under an approved contract. In short, appellant contends that the Stull and television booster station matters were in "the nature of a court proceeding" and that he was entitled to additional compensation for such services under the additional compensation part of the general counsel contract which in pertinent part provided:

> Compensation: the attorney shall receive the following compensation:
>
> 1. * * * for general legal services * * *
>
> 2. For each case litigated in court or *of the nature of a court proceeding as directed by the tribe,* such additional compensation that may be agreed by the tribe and attorney with the approval of the Commissioner of Indian Affairs. (Italics supplied.)

Moreover, the appellant in further support of his appeal and claim for additional compensation cites and relies on the following Tribal Resolutions which provided:

58–387, adopted March 12, 1958—"RESOLVED that Mr. Mobley represents the Tribe on mineral rights and school claim for the old railroad right of way."

59–368, adopted April 10, 1959—"RESOLVED, That the Representative Tribal Council hereby authorizes and directs Roy T. Mobley, Tribal Attorney, to represent the Tribe in proceedings to obtain from the Federal Communications Commission of Washington, D.C. permission to install and operate a Television Booster or Translator station for the purpose of rebroadcasting television programs at Dulce, New Mexico, and to the surrounding area, the fee of the said attorney to be determined upon the basis of services rendered from time to time as approved by the Commissioner of Indian Affairs or his authorized representative. The Executive Committee is authorized to advance or reimburse the attorney for all necessary expenses incurred in this matter."

(2) that his general counsel contract was extended past March 1960, by Tribal Resolution 60–216, adopted March 4, 1960, and an extension agreement signed by the Tribe and appellant and that the action or inaction of the Department of the Interior thereon led the parties to believe that the extension agreement was in effect until December 20, 1960, when appellant was finally advised by the Department that his proposed renewal of his general counsel contract was being returned without approval.

At the outset, it is noted that no place in the record does the Commissioner, the Area Director, or the Tribe allege or deny that the services set forth in categories (1) and (2) were not performed. Therefore, it must be concluded that the services itemized in the vouchers for which the claims are based were performed by the appellant. It must then follow that the allowance of categories (1) and (2) of the claims focuses around the question as to whether the services performed thereunder were covered by the general legal services provision ($250 per month) or by the additional compensation provision of the general counsel contract.

Tribal Resolutions 58–387 and 59–368, *supra*, although brief and somewhat general, adequately identify and authorize the appellant to represent the Tribe in the Stull and television booster station matters. The Board cannot perceive of any valid reasons why the Tribe would have gone to the unnecessary time and effort of passing the resolutions in question if it had considered the services to be performed thereunder were to be covered under the general legal services clause rather than the additional compensation clause of the general counsel contract. Nor can we see why the services rendered thereunder cannot be considered as being in the nature of court proceedings in view of the specialized work involved. Accordingly, the Board finds that the services set forth in categories (1) and (2) of appellant's claims are reasonable and compensable under the additional compensation provision of the general counsel contract.

With regard to the final category of appellant's claims for services rendered as general counsel and expenses incurred subsequent to March 31, 1960, we are constrained to sustain and affirm the Commissioner's decision thereon.

The record indicates that proposed renewal of appellant's general contract beyond March 31, 1960, was never approved by the Secretary or his authorized representative as required by 25 U.S.C. § 476 (1970). The foregoing statute clearly requires approval of such contracts by the Secretary or his authorized representative.

[1] In the absence of an approved contract, fees for general counsel services allegedly performed and expenses incurred in connection therewith by the appellant during the interim cannot be allowed and must be denied.

Regarding the Tribe's contention, concurred in by the Commissioner, that the appellant's claims are bared by the New Mexico six (6) year statute of limitation, sections 23–1–1 and 23–1–3, the Board finds the statute, *supra*, inapplicable in the appeal herein. The record clearly indicates the appellant filed his vouchers for the services rendered with the Bureau of Indian Affairs in the years 1960 and 1961 well within the period provided by the statute, *supra*. We make no finding as to the application of the New Mexico statute in this case. Even if

it were applied, the time could not have begun to run until December 1, 1972, which was the date of the first definitive action taken on the vouchers which had been held in the government files since the 1960 and 1961 filing.

In view of the reasons hereinabove set forth, the decision of the Commissioner, Bureau of Indian Affairs, dated May 13, 1974, denying appellant's claims for legal fees for services rendered and expenses incidental thereto should be reversed as to categories (1) and (2) of the claims and affirmed as to category (3) of the claims.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and 211 DM 13.7 issued December 14, 1973, the decision of May 13, 1974, of the Commissioner, Bureau of Indian Affairs, in denying appellant's claims for legal services rendered to the Jicarilla Apache Tribe of New Mexico and for expenses incurred in connection therewith is (a) REVERSED as to categories (1) and (2) of appellant's claims and the claims represented thereby in the amount of $3,634.37 are ALLOWED and payment therefor shall be made at the earliest date possible, and (b) AFFIRMED as to category (3) of appellant's claims.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

DAVID J. MCKEE,
Chief Administrative Judge.

UNITED STATES
v.
GOLDEN GRIGG, ET AL.

19 IBLA 379

Decided *April 7, 1975*

Appeal from decision of Administrative Law Judge Robert W. Mesch canceling fourteen desert land entries.

Affirmed.

1. Desert Land Entry: Generally—Act of March 3, 1891—Words and Phrases

Section 7 of the Act of Mar. 3, 1891, provides that no person or association of persons shall hold by assignment or otherwise, prior to the issue of patent, more than 320 acres of arid or desert lands; the terms "hold," "assignment" and "otherwise" are words of broad significance and will be defined in such manner to effectuate the purposes of the Act, to wit, to prevent anyone from holding more than 320 acres of desert lands to the exclusion of bona fide settlers or the entrymen of record.

2. Desert Land Entry: Generally—Act of March 3, 1891—Words and Phrases

Any person or association of persons who controls, possesses and receives substantial benefits from desert lands will be regarded as "holding" such lands within the meaning of the Act of Mar. 3, 1891.

3. Desert Land Entry: Cancellation

Any desert land entry made for the use and benefit of others with intent to cir-

cumvent the provisions of the desert land laws must be regarded as fraudulent and will be canceled.

APPEARANCES: Riley C. Nichols, Esq., and William Burpee, Esq., United States Department of the Interior, Boise, Idaho, for appellee; William F. Ringert, Esq., Anderson, Kaufman, Anderson and Ringert, Boise, Idaho, for appellants.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARRD OF LAND APPEALS

Golden Grigg and 13 other desert land entrymen [1] have appealed from the November 27, 1972, decision of Administrative Law Judge Robert W. Mesch, which canceled all 14 of their desert land entries for "illegal inception" and "failure to comply with the requirements of law."

The Desert Land Act of 1877, *as amended*, 43 U.S.C. §§ 321–329 (1970), provides that an American citizen, 21 years of age, may enter up to 320 acres of desert land and, after meeting certain cultivation and irrigation requirements, may obtain patent to the land. One of the express limitations on entries is contained in 43 U.S.C. § 329 (1970), which provides in part that "no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands." A further limitation found in 43 U.S.C. § 329 (1970), provides in part that no assignment to or for the benefit of any corporation shall be authorized or recognized.

The Bureau of Land Management (BLM) initiated contest proceedings against these entries on July 14, 1967, by issuing complaints charging in each case that:

(a) Application for entry was not made in good faith in that the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by Section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. Sec. 321.

(b) The contestee entered into agreements whereby others held his entry, together with other desert land entries, in an aggregate of more than 320 acres in violation of Section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. Sec. 329.

(c) The contestee did not reclaim, irrigate, and cultivate the entry land as required by Section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

(d) The contestee entered into arrangements whereby his entry was assigned to and for the benefit of a copartnership in violation of Section 2 of the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

After lengthy hearings Judge Mesch found that the entries had

[1] Appellant: *Desert land entry*

Golden Grigg, Idaho	013917
LeFawn Grigg	013918
Fred Baines	013919
Otis H. Williams	013920
Kathryn Williams	013921
Lovell Taylor	013922
William A. Anderson	013923
Saragene Smith	013924
Thomas M. Anderson	013925
Bonnie Anderson	013926
Charles L. Taylor	013927
Darlene Baines	013928
Lu Ann Hogg	013933
Paul R. Hogg	013934

been held by a partnership in violation of 43 U.S.C. § 329 (1970), which prohibits any person or association of persons from holding more than 320 acres of desert land by assignment or otherwise.

Judge Mesch also entered a finding that the entries were not made in good faith and were fraudulent:

> If a disclosure had been made to the Land Office that the individual entrymen were not the sole parties in interest and that the individual entrymen did not intend to reclaim the land for their own use and benefit, the Land Office could not properly have allowed the entries. The courts have consistently held that a failure to disclose facts which, if disclosed, would result in a denial of a grant under the Public Land Laws renders the obtaining of the grant fraudulent. *United States* v. *Trinidad Coal & Coking Company*, 137 U.S. 160 (1890); *United States* v. *Keitel*, 211 U.S. 370 (1908). (Dec. at 47.)

Finally, Judge Mesch found that the entries had not been *assigned* in violation of 43 U.S.C. § 324 (1970).

Appellants attack the finding by Judge Mesch that the entries were *held* by a partnership and not by the entrymen. Essentially, they assert that the prohibition against holding "by assignment or otherwise" prohibits holding only in the sense of holding or obtaining title, and not the holding of a lesser interest. Consequently, appellants assert, there could be neither bad faith nor fraud since even if the BLM had known all the facts, they should have allowed the entries.

Alternatively, appellants argue, the government is estopped from applying what the appellants assert is a new interpretation of law.

At the outset of his opinion Judge Mesch set forth the various interrelationships among the entrymen, the Grigg and Anderson partnership and others. To avoid confusion, we adopt that approach.

The entrymen, their relationship to each other and their connection with the partnership known as Grigg and Anderson Farms are as follows:

Golden Grigg—a partner in Grigg and Anderson Farms.

LeFawn Grigg—Golden Grigg's wife.

Fred Baines—Golden Grigg's son-in-law.

Darlene Baines—Fred Baines' wife and Golden Grigg's daughter.

Otis Williams—a partner in Grigg and Anderson Farms.

Kathryn Williams—Otis Williams' wife and Golden Grigg's sister.

Charles Taylor—Otis Williams' son-in-law.

Lovell Taylor—Charles Taylor's wife and Otis Williams' daughter.

William Anderson—Vanness Anderson's son. Vanness Anderson is a partner in Grigg and Anderson Farms.

Bonnie Anderson—William Anderson's wife.

Paul Hogg—Vanness Anderson's son-in-law.

Lu Ann Hogg—Paul Hogg's wife and Vanness Anderson's daughter.

Saragene Smith—Ray Anderson's daughter. Ray Anderson is a partner in Grigg and Anderson Farms.

Thomas Anderson—Albert Anderson's son. Albert Anderson is a partner in Grigg and Anderson Farms.

Jack Anderson and his wife, Marilyn, were in the initial group of entrymen. Jack Anderson was killed in an automobile accident in 1964. In December of 1964 his entry was assigned to Thomas Anderson, his brother, and Marilyn Anderson's entry was assigned to Saragene Smith. Jack Anderson was Albert Anderson's son.

Grigg and Anderson Farms is a copartnership of six persons, three related to the Griggs and three related to the Andersons. On the Grigg side are two brothers, Nephi Grigg and Golden Grigg, and their brother-in-law, Otis Williams. On the Anderson side are three brothers: Vanness, Ray, and Albert. The partnership was formed in 1958 or 1959 and has engaged in extensive development of new lands and in farming. One of the most important functions of the partnership has been the procurement of large quantities of potatoes for Ore-Ida Foods, Inc. Golden Grigg and Vanness Anderson are primarily responsible for the conduct of the partnership's business.

Ore-Ida Foods, Inc., is a food processing corporation controlled by the six members of the Grigg and Anderson partnership from 1953 to 1967. The members of the partnership were the principal stockholders until 1967 when Ore-Ida was acquired by H. J. Heinz Corp. Nephi Grigg served as president and Golden Grigg, Otis Williams, and Vanness Anderson served as vice presidents. Golden Grigg took care of potato procurement; Vanness Anderson supervised the corporation's farming activities; and Otis Williams was in charge of production at the corporation's three plants in Idaho, Oregon and Michigan.

G. T. "Bud" Newcomb is an irrigation engineer and irrigation pipe salesman, who has worked closely with the Grigg and Anderson partnership in developing new lands and constructing irrigation systems.

Anderson Brothers is a copartnership of Vanness, Ray, and Albert Anderson which is engaged in farming operations. Land Creek Farms is a copartnership of Nephi Grigg, Golden Grigg and Otis Williams which is also engaged in farming.

Harley McDowell is president of Idaho Land & Appraisal Service, a private organization which performs a variety of real estate services for clients including mapping, appraising, filing land applications and general consulting services (Tr. 918).

On February 25 and 27, 1963, applications to enter 14 parcels of land containing 4,458 acres were submitted to the Idaho State Office, Bureau of Land Management. The applications and initial filing fee of 25 cents per acre were submitted by

Idaho Land & Appraisal Service for each one of the 14 entrymen.

Each application contained statements indicating that the individual entrymen had a permanent right to sufficient water to irrigate the crops to be grown on his entry. According to material submitted with the applications, each entryman claimed ownership of stock in the Cottonwood Mutual Canal Company. The Company was to be responsible for the construction of irrigation facilities to provide water for each entryman.

On March 5, 1963, officials of the BLM met with Golden Grigg and Vanness Anderson to determine what further information needed to be submitted to the BLM before the 14 entries could be allowed. First, it was agreed that documentation of the exact relation between the Cottonwood Mutual Canal Company and the individual entrymen would have to be submitted. Second, a report would have to be submitted showing the economic and engineering feasibility of the proposed project. Third, it would be necessary for the entrymen to reimburse the BLM for prior expenditures for improvement of the range.

The feasibility report and the documents relating to the Cottonwood Mutual Canal Company were submitted some two months later. (Ex. G–24.)

The feasibility plan called for pumping water from the Snake River onto Black Mesa. From there, water was to be delivered to 13 of the 14 entries by an open-ditch gravity system; the remaining entry was to be irrigated by a sprinkler system. The cost per acre for each entry was estimated to be $92.25.

The documents relating to Cottonwood Mutual Canal Company (Ex. G–24) called for each entryman to purchase one share of stock at $100 per share for each irrigable acre of land. The payments were to be in ten equal, annual installments, with the first payment due when the entries were allowed by the BLM. In order to secure payment for the stock, the company required each entryman to mortgage his entry to the Company.

On behalf of the entrymen, Idaho Land and Appraisal Service submitted a check to the BLM to pay for the prior range improvements.

On the basis of the foregoing submissions, the BLM allowed the entries in February 1964. However, there is a plethora of facts, which, if known to the BLM at the time the entries were allowed, would necessarily have resulted in rejection of the applications to enter. The circumstances surrounding each of the aforementioned submissions clearly show that the entire series of transactions, from the beginning to the present, are an elaborate device to circumvent the law. Further, it is clear that the entries were made for the primary benefit of the Grigg and Anderson Farms partnership, with a secondary benefit running to the individual entrymen. A recapitulation of the submissions to the

BLM, in the context in which they occurred, will clearly show that the entrymen were making the entries principally for the use and benefit of the partnership.

Several of the entrymen involved in these proceedings had attempted to enter other desert lands in a nearby area of Idaho. Applications to enter the area had been filed with the BLM in 1960. The Cottonwood Mutual Canal Company was formed at this time. Eventually, State water permits for some of the applicants were obtained. At one time Golden Grigg had considered the possibility of having the entries assigned to Idaho Industries, a predecessor of Ore-Ida Foods, Inc. After Mr. Grigg's attorney advised him that any such plan was contrary to the law, he decided not to pursue it. The water permits were assigned to Idaho Industries and then to Ore-Ida Foods. Finally, the BLM, even without knowledge of the assignment of the water permits, rejected all the applications to enter.

In February of 1963 Golden Grigg found another area of public land which he and Vanness Anderson considered suitable for development. On February 22, 1963, eight persons related to the Grigg side of the Grigg and Anderson partnership, and six persons from the Anderson side drove to the Black Mesa area to "view" the land. Apparently the purpose of the trip was to enable the entrymen to swear that they had inspected the land, since the application to enter requires each applicant to state:

> **6. I CERTIFY that on (date) ------, I made a personal on-the-ground examination of every legal subdivision of the above-described land to the extent necessary to assure me that the lands applied for:**
>
> **a. Are essentially nonmineral lands, and to the best of my knowledge there is not within the limits of any of the legal subdivisions applied for, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, nor any other valuable mineral deposit, salt deposit, or salt springs, except as follows * * *.**
>
> **b. Are not worked for minerals during any part of the year by any person or persons except * * *.**

At best the "on-the-ground examination" of the land can be described as cursory.

With perhaps one exception, Golden Grigg, none of the entrymen knew which tract he would be applying for. The actual survey and plotting of the various parcels of land had already been accomplished by Harley McDowell of Idaho Land and Appraisal. After the inspection of the Black Mesa area, the group of entrymen gathered at a nearby restaurant where Harley McDowell's secretary filled out the applications for entry of the desert land, which they signed. On that same day, February 22, 1963, on instructions from Golden Grigg, a check in the amount of $3,035 was drafted on the account of Grigg and Anderson Farms and made payable to Idaho Land and Appraisal (Tr. 2806; 3084). The entrymen made no payment at this time.

Golden Grigg testified that he insisted on being given an entry in the center of the land:

Q. Did you feel that you were entitled to determine who would be the entrymen on several of the tracts?

A. I don't think that I did, I think that actually we told them approximately what the deal was, that I did want the center, and outside of that I think it was more or less done by Harley's office, and Newcomb, and maybe myself, but I don't really remember the details of whoever it was, they was anxious enough to get a piece of land that there wasn't any argument about it. (Tr. 853.)

Otis Williams testified that he had been given no choice in the selection of his designated entry (except that he didn't have to take the entry if he didn't want it). He said, however, that he thought that if he had protested being given that entry he could have had a choice, "being in one of the Grigg and Andersons." (Tr. 2002.) Otis Williams is one of the partners in Grigg and Anderson Farms. This speculation that the partnership would probably have given a preference to one of partners to select a different entry indicates that it was the partnership, not the entrymen, which controlled who got what.

Paul Hogg and his wife, Lu Ann, each got entries. Paul Hogg testified that in January of 1965 he was employed by Ore-Ida Foods at a salary of less than $7,000 per annum, that his wife was not employed, they did not own or rent their own house but resided rent-free in a house owned by his father-in-law, that his net worth was not "what you would call substantial," and yet this arrangement with Grigg and Anderson Farms afforded him the opportunity to contract a personal obligation amounting to nearly $72,000 just for his share of the main irrigation system (Tr. 2454–57). Nevertheless, he testified that had he not the advantage of the Grigg and Anderson deal he could have financed the land clearing and leveling from outside sources and purchased his sprinkler pipe on a conditional sales contract after making a substantial down payment (Tr. 2452).

All of the applicants had the impression that the Grigg and Anderson partnership would develop the lands and handle all the details necessary for the allowance of the entries.

For example, Fred Baines testified that he assumed a corporation would develop the entries:

Q. So why did you feel it was necessary to engage some other corporation to do it?

A. Because we didn't as entrymen, individuals, didn't have anything to do it with, and we thought our dads and so on could.

Q. That had been the understanding from the beginning had it not from the time you filed your application?

A. For them to develop the project?

Q. Yes.

A. Yes (Tr. 267).

Bonnie Anderson testified as follows:

Q. Now at the time of this trip, do you recall whether there was any consideration given to whether the Grigg and Anderson co-partnership was interested in this Black Mesa project?

A. Well, I don't know that it was voiced, but I think we all assumed.

Q. I see. They had been involved in developing land for some time, as I understand it?

A. Yes. (Tr. 426.)

Lu Ann Hogg testified to the same effect:

Q. Has your father [Vanness Anderson] helped you throughout the development of your entry?

A. Yes.

Q. Have you looked to him primarily to see that everything was done on your entry that needed to be done?

A. Yes.

Q. And did you realize that the development work on the land has been done by the Grigg and Anderson partnership?

A. Well, I left that more or less up to my father as him being one of the partners. (Tr. 710.)

In short the entrymen assumed that everything that had to be done to perfect the entries would be taken care of by the Grigg and Anderson partnership, including handling all contact with the BLM, clearing the land, developing the irrigation system, farming, marketing, and accounting for costs and proceeds and disbursing funds.

Subsequently, the applications for entry were filed with the BLM on February 25 and 27, 1963, by the Idaho Land and Appraisal Service. At the same time, Harley McDowell began work to obtain water permits from the State of Idaho.

After the meeting between officials of the BLM on March 5, 1963, attorney William Ringert was directed to prepare documents showing the organization of the Cottonwood Mutual Canal Company. Mr. Ringert prepared the mortgage agreements between each entryman and the Cottonwood Mutual Canal Company. He was paid by the Grigg and Anderson partnership.

An employee of Idaho Land and Appraisal Service prepared the economic and engineering feasibility report. As previously noted, the report called for an open ditch gravity system to irrigate 13 of the 14 entries. It is clear that the sole purpose of the feasibility report was to induce the BLM to allow the entries. The planned development was supposedly a joint project of the individual entrymen. In fact, none of the entrymen were familiar with the report or with any part of the proposed plan. Golden Grigg testified that he had never intended to use the plan contained in the report to develop the land.

Q. Well, is it true sir that you never then adopted that feasibility report as your own?

A. Well, I guess I didn't read it that close.

Q. Did you read it at all?

A. I doubt it. But when the closed system came up after Sailor Creek came in Bud recommended that we change it. I am saying that there was never a gravity intention on Black Mesa, it wouldn't have been practical * * *. (Tr. 1320.)

Harley McDowell, who was ultimately responsible for the preparation of the report, testified that the feasibility report was "purely a paper plan to satisfy the Bureau." (Tr. 3083.) Idaho Land and Appraisal Service was paid for its work in producing the plan by the Grigg and Anderson partnership. Idaho Land and Appraisal Service was also paid by the Grigg and Anderson partnership for the payment submitted to the BLM as reimbursement pay for range improvements.

After the entries were allowed in Feb. of 1964, work began in

earnest to put the land into actual production. However, it was not until March of 1965 that the BLM had any knowledge that the entrymen were not the real parties in interest.

Golden Grigg and Vanness Anderson hired G. T. "Bud" Newcomb to design and build the irrigation system. The work was begun in the fall of 1964 and was completed by April of 1965. As of December 31, 1965, development costs had exceeded $1,400,000.

The actual system was not an open-ditch gravity system; the entire system utilized closed-pipes and sprinkler laterals. The system was laid out in the most efficient way to irrigate the project as one large farm—a way which ignored the separate irrigation of each individual entry. Although the contestees assert that the system can be converted to serve the individual entries, contestant's witnesses maintain that this would not be feasible. Mr. Newcomb was paid for his work by Vanness Anderson and by the Grigg and Anderson partnership.

Vanness Anderson also hired Mr. George Lake to prepare the land for farming and to construct support facilities for the operation. The support facilities include ten large potato cellars, a machine shop, and a labor camp necessary for pipe movers. The entrymen took no part in either the making of the decisions or in the actual work. Mr. Lake was paid for his services by the Grigg and Anderson partnership.

The money actually used to pay for the development expenses was obtained by Vanness Anderson from the U.S. National Bank of Oregon. The money was loaned largely on the financial strength of the Grigg and Anderson partnership.

On January 29, 1965, three different agreements were signed by each of the entrymen: 1) a "Construction Contract" providing for the construction of the irrigation system, 2) a "Land Development Agreement" providing for the complete preparation of the soil for planting crops, and 3) a "Farm Operating Agreement" providing for the farming of all of the entries by the Grigg and Anderson partnership.

The thrust of the "Construction Contract" was that the Grigg and Anderson partnership, rather than the Cottonwood Mutual Canal Company, would construct the irrigation system. The original mortgage and subscription agreements between the canal company and the entrymen were canceled, notwithstanding that these were the agreements the BLM had relied on in allowing the entries. For construction of the system the entrymen agreed to pay the partnership $225 per acre in 15 equal, annual installments. Each entryman gave, as security for the payments, a promissory note, a mortgage on his lands, and a pledge of his stock in the canal company, which still owned the water permits. William Ringert, the attorney who prepared the

agreements, testified that one of the primary reasons for the change was that no one could take advantage of the tax investment credit for the system if it were owned by the canal company. (Tr. 4254.) Conveniently enough, the Grigg and Anderson partnership "had a tax problem" and were the only ones who "needed" the tax investment credit (Tr. 1252).

The second agreement signed by the entrymen on January 29, 1965, was a "Land Development Agreement" which provided that the Grigg and Anderson partnership would completely prepare the land in each entry for planting. The entrymen were to pay for the development work in 15 equal, annual installments.

The third agreement entered into by the entrymen and the Grigg and Anderson partnership on January 29, 1965, was a "Farm Operating Agreement." The agreement provided that the partnership would farm the land for a period of approximately ten years. The partnership would pay all of the expenses of farming and the entrymen were to receive annual rental payments in return. The partnership was granted the right to construct and retain ownership of permanent improvements, such as buildings. Finally, the partnership was granted a ten-year lease on the irrigation system in order to be eligible for the tax investment credit attributable to the system.

The amount of the annual rental payment that each entryman was to receive under the Farm Operating Agreements was approximately equal to the amount of his payment under the Construction Contract and Land Development Agreement plus enough for each entryman to pay his increased taxes.

The combined result of the three agreements was the shifting of all possession, control and nearly all benefit of the entries from the individual entrymen to the Grigg and Anderson partnership; that is, the paper agreements finally reflected the true relationship between the partnership and the entrymen. It is clear that the agreements were based on the needs and desires of the partnership; the agreements were drawn up at the direction of Golden Grigg for the benefit of the partnership and presented to the entrymen for their signatures.

The subsequent course of conduct between the partnership and the entrymen can only be considered consistent with the finding that at every step of the operation the partnership exercised total control and possession of the entries and received nearly all, if not all, of the benefits of the land. For example, there can be no doubt that from the time of inception, or very shortly thereafter, the partnership formed the intention to farm these entries for a minimum period of ten years, as set forth in the operating agreements. The evidence strongly indicates that the partnership never altered this intention prior to submission of the final proofs. Their attorney, appearing as a witness,

testified that after reviewing an opinion by the Solicitor of this Department written in Apr. 1965 (72 I.D. 156), be reacted as follows:

> In a telephone conversation * * * I advised them to cancel the operating agreements. My advice to them was to just cancel those ten years operating agreements, and proceed on a year to year basis under essentially the same terms that you got set out in that ten-year operating agreement. (Tr. 4260.)

This cancellation of the formal agreements does not in any way suggest an alteration of the intent of the partnership to proceed with the program as planned. It only suggests that they deemed it necessary to alter the formal expression of that intent.

In order to compensate for the loss of the tax investment credit on the irrigation system, which occurred as a result of canceling the ten-year farm operating agreement, the partnership increased the amount of the annual payments to the entrymen, thus creating larger deductions for the partnership. The entrymen were then able to take the investment credit.

The actual farming operations also reflect complete control by the partnership. In 1965 and 1966 all of the entries were planted in potatoes. It is clear that the partnership did so for the benefit of Ore-Ida Foods, Inc., a large potato processing corporation controlled by the Grigg and Anderson partnership. Golden Grigg testified to that effect at the hearing:

> Q. Well, in any case your potato procurement operations would ordinarily result in a profit at least to the Ore-Ida Foods would it not?
>
> A. I could explain a little bit my ideas if you want to hear them.
>
> Q. I would appreciate that sir.
>
> A. All right. We found out, and I have found out since, that to deal with people that you can depend on [for] large amounts of potatoes is very healthy. In other words, let's take '65 for instance. Grigg and Anderson and Anderson Brothers is almost the only people that delivered their potatoes to Ore-Ida for what they were contracted for. They went up to $8.00 or $10.00 a hundred, do you think a farmer is going to deliver that kind of potato for a buck, hell no he ain't.
>
> Q. They would just withhold the potatoes?
>
> A. Yes, they would lock the cellar on you.
>
> Q. Well—
>
> A. We have used a million sacks of potatoes and we need these huge amounts of potatoes that we knew we was going to get. We was selling against them.
>
> Q. Well it was then to Ore-Ida's benefit I take it [to] deal with what they considered to be the reliable Grigg and Anderson partnership?
>
> A. That is right.
>
> Q. Well of course the partnership had a motive in being reliable in that the partners were themselves shareholders in the Ore-Ida Foods?
>
> A. That is right. (Tr. 820, 821.)

Nevertheless, even at the prices paid by Ore-Ida (which apparently were substantially below the price being paid for potatoes on the open market), the gross proceeds from the potato crop on the project was approximately $1,600,000 in 1965, and nearly that much in 1966 (Tr. 372).

In 1967 and 1968 the farming operations were split between the Grigg faction and the Anderson

faction of the partnership, presumably due to a dispute between Golden Grigg and Vanness Anderson. The farming operations were split in half, even though there were eight entrymen in the Grigg faction and only six in the Anderson faction. The Grigg faction farmed the north half of the area including the entry of Lu Ann Hogg, who was related to the Anderson faction. The Anderson faction farmed the south half which included the entries of both Charles and Lovell Taylor, who were related to members of the Grigg partnership. Clearly, the division of lands was made on the basis of the interest in the land held by each faction in the partnership, and not on the basis of tracts held by the individual entrymen, or their family affiliation.

In 1968, after the partnership had transferred control of Ore-Ida Foods, Inc., potatoes were sold for the first time to other buyers. In 1969 all of the entries were again farmed as one unit. However, due to a bad farming year, the payments from the partnership to the entrymen were drastically reduced. In fact, the schedule of payments called for in the Farm Operating Agreement was largely ignored. At the end of each year, the entrymen were called into the Grigg and Anderson partnership offices. The partnership's accountant and bookkeeper were both present. They had already determined how much each entryman was to receive and how much he would be required to pay back. None of the entrymen were aware of the basis for the payments. Essentially, each one received enough money to pay for his promissory notes plus enough to pay his increased taxes. A "nominal" amount was added for "spending money," or as Golden Grigg so succinctly stated the proposition, " * * * we leave them enough to pay their taxes, and maybe buy an ice cream cone." (Tr. 895.)

In the summer of 1965, after crops had been planted, but before they had been harvested, each of the entrymen was paid an advance of $1,500 by the Grigg and Anderson partnership. However, it is clear from the testimony that the money was advanced to each entryman to cover the checks which each entryman had already issued to the partnership to show compliance with the provision of the desert land law, which requires the payment by each entryman of $3 per acre on improvements. The partnership did not deposit the entrymen's checks until two weeks later, after it advanced each entryman enough to cover those checks. Clearly, the entrymen's payments to the partnership were a sham to convince the BLM that each entryman had complied with the law.

When Jack Anderson was killed and his widow assigned their two entries, it was the partnership which paid her the $4,000 consideration—not the assignees. After Thomas Anderson took the assignment of one of the entries he went up and looked at the project, but he testified that he did not know

which entry was his, or where it lay in the project. He only knew he had 320 acres. (Tr. 491.)

The evidence may be summarized as follows. First, at no time did the entrymen have possession of their entries. Second, at no time did the entrymen exercise any control over any operations regarding their entries. Third, at no time did the entrymen have any influence on decisions regarding what tract(s) he was to receive, the terms of the various agreements with the Grigg and Anderson partnership, or the amount of compensation he was to receive from the farming operations. Fourth, at most, the entrymen received 20 percent of the gross proceeds of some crops, except when the partnership decided the entrymen should have less. It is not clear whether even that benefit was real or merely a paper benefit, since the partnership consistently ignored the terms of the various agreements when it found it convenient to do so. Fifth, the applications and representations to the BLM were made for the purpose of inducing action favorable to the entrymen. In fact, there was little relation between representations made to the BLM and the actions of the entrymen. Sixth, the entrymen never made any out-of-pocket investment of their own funds. All money which they expended in the course of filing, planning and developing the entries was provided them by the partnership.

Perhaps the most striking feature of the entrymen's testimony is the lack of any real knowledge of or interest in the entries from the initial "inspection" of the lands to the time of the hearing. While each entryman stated at the hearing that he hoped to obtain the land in his entry, each one also testified that he had done virtually nothing to further that hope, except to sign the documents and draw the checks in accordance with the instructions of the partnership. Each entryman's knowledge of his own entry was so sketchy that seven years after the entries had been made one entryman, Lu Ann Hogg, couldn't state whether the entry was "square" (It was an eight-sided polygon.), or even whether the entry was fenced (It was). (Tr. 718, Ex. G–6.) Another entryman, Thomas Anderson, couldn't recall whether there were any houses on his entry (There were). (Tr. 453, Ex. G–7.) Another entryman, Fred Baines, testified that at the time he made his application he didn't even know for sure where his particular entry was, and only learned where it was from the legal description on the application form. He did not know then how it should be irrigated, and even at the time of the hearing he could not say whether there had been any leveling of the land on his entry. (Tr. 1785.) The entrymen displayed no interest in the terms of the various agreements with the partnership, nor in the kind of crops grown on the entries, nor in the basis used to calculate the annual crop payments. In short, the entrymen evinced a near-absolute lack of fa-

miliarity with matters relative to their entries, and even an absence of any curiosity concerning them. Indeed, one of the few things that any of the entrymen could testify to with any certainty was the authenticity of their signatures on the various documents, though, their recollection of the circumstances surrounding their signing remained consistently vague.

[1] The basic legal issue presented in this appeal is whether the Grigg and Anderson partnership *held* more than 320 acres *by assignment or otherwise* before the issuance of patent, in violation of 43 U.S.C. § 329 (1970). Administrative Law Judge Robert W. Mesch found that, in fact, the partnership had held all of the entries by means other than assignment. (Dec. 36.) The Appellants have attacked that conclusion by arguing that the purpose of the limitation prohibiting holding of more than 320 acres was to prevent any person or group of persons from *acquiring title* to more than 320 acres of desert land; appellants argue that even if the Grigg and Anderson partnership had possession and control of the entries, and received the lion's share of the benefits of these entries, facts which they deny, such facts would be irrelevant since at no time did the partnership attempt or intend to obtain title to the entries. Appellants further assert that in the light of what they perceive to be the purpose of the 1891 amendment, that is, to prevent acquisition of title, the phrase "by assignment or otherwise" should be construed to mean by assignment or means tantamount to assignment. Appellants urge that this Board apply the rule of "*ejusdem generis*" in so defining the word "otherwise."

The word "hold" is not free from ambiguity. For instance, *Black's Law Dictionary* gives several definitions of the word, which, for the purposes of this case, could result in differing legal conclusions:

> To possess in virtue of a lawful title; as in the expression, common in grants, "to have and to hold," or in that applied to notes, "the owner and holder." (citation omitted.)
>
> To be the grantee or tenant of another; to take or have an estate from another. Properly, to have an estate on condition of paying rent, or performing service.
>
> * * * * *
>
> To possess; to occupy; to be in possession and administration of; as to hold office.
>
> To keep; to retain; to maintain possession of or authority over. (citation omitted.)

Black's Law Dictionary, 864 (4th ed. rev. 1968). *See also* 19A *Words and Phrases* 186 (Perm. Ed. 1920); 40 C.J.S. *Hold* (1944).

We agree with the appellants that it is proper to examine the history of the desert land laws in order to ascertain the meaning of the phrase "hold by assignment or otherwise." As Justice Holmes once stated, "A page of history is worth a volume of logic." *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

The Desert Land Act of 1877, 19 Stat. 377, provided that one who was a citizen or intended to become a citizen could enter and obtain title to 640 acres of desert land. That the Act had dual purposes is clear.

Those purposes included both the reclamation and settlement of the land. The report of the Senate's Committee on Public Lands is instructive on this point. It states in part:

> Experience has shown that the homestead and pre-emption laws afford no means of acquiring title to desert lands. Those laws require settlement and occupation as a prerequisite. Neither settlement nor occupation is possible without water. Irrigation must precede the settlement. But this is expensive, and settlers upon the public lands are unwilling to construct the necessary ditches and canals to irrigate lands to which they have no title and no certainty of obtaining title.
>
> It has been suggested that these lands be sold in large quantities in order to induce private capital to undertake the work of their reclamation. Your committee fear that any system of sale whereby the title would pass before irrigation would encourage speculation without inducing settlement. * * *
>
> 1965 (1877).

(5 *Cong. Rec.*)

Clearly, the Committee's Report is concerned with both reclamation of the lands and with settlement of the lands. Those concerns were also expressed in the Senate debate on the bill. One fear that was expressed by several senators in the debate was that a small number of people could hold a large area of desert lands without developing them and at the same time exclude bona fide settlers from making entry. For example, during the debate Senator Chaffee stated that:

> * * * Five or six individuals can locate as many miles square of land as they may select in any valley of any state or territory named in the third section of this bill, and hold that land for three years without doing any work at all. There is nothing in the bill to prevent them from filing another declaration, at the end of another three years, and in that way they can exclude this land from location for all time, thus preventing *bona fide* settlers from occupying and purchasing it under our present system. * * * 5 *Cong Rec.* 1965 (1877).

Almost immediate abuse of the Act became commonplace. Large syndicates would purchase assignments of individual entries on a wholesale basis. For example, Representative Vandever of California, in an 1888 House debate, stated:

> This desert-land act was passed on the 3rd day March 1877. Within sixty days from the time of the passage of the act, in the district I represent, in upper San Joaquin valley nearly 400,000 acres of land were located upon under the provisions of the act, and almost immediately the parties who made the location transferred and assigned the land to other parties. Today the land is held by a syndicate that has never paid but 25 cents an acre for the land. The parties who made the location were dummies. * * *
>
> Many of these lands that are so held under the desert-land entries of eleven years ago today to the actual settlers would be worth a thousand dollars an acre, and yet they are called desert lands. * * * The act of the 3rd of March, 1877 provides specifically that the person making the settlement must make it for himself alone; but the law has been so perverted that the syndicate to which I have referred have held nearly 400,000 acres of land.
>
> * * * * *
>
> * * * The great point is that we want the 300,000 acres thus suspended restored to the public domain, so that the honest settler may have an opportunity of going upon it and getting a homestead. 19 *Cong. Rec.* 5571–72 (1888).

Apparently, between 1877 and 1880 local land offices had permitted assignments based upon statements contained in *Circular Instructions of Mar. 12, 1877*, 2 Copp's Land Laws 1375 (1882). While the instructions themselves did not mention assignments, the sample of the sworn oath required of each entryman contained the following paragraph:

> It is, therefore, further certified, that if within three years from the date hereof the said ------, *or his assignee* or legal representative, shall satisfactorily prove that the said land has been reclaimed by carrying water thereon, and shall pay to the Receiver the additional sum of one dollar per acre for the land above described, he or *they* shall be entitled to receive a patent therefor under the provisions of the said act. (Italics added.)

2 Copp's Land Law 1376.

But in 1880 the Department ruled that there was no authority in the Desert Land Act for permitting assignments. *S. W. Downey*, 2 Copp's Land Laws 1381 (1882). This ruling was subsequently modified by Secretary Teller in 1884. The Secretary held that assignments made between Mar. 12, 1877, and Apr. 15, 1880, would be recognized, but with one important limitation—no person could acquire by entry or assignment more than 640 acres. *David B. Dole*, 3 L.D. 214, 216 (1884).

In 1887 the Department issued instructions which stated in part:

> 2. Desert land entries are not assignable, and the transfer of such entries whether by deed, contract or entry, vitiates the entry. *An entry made in the interest or for the benefit of any other person*, firm or corporation *or* with intent that *the title shall be conveyed to any other person*, firm or corporation is illegal. (Italics added.)

Circular, 5 L.D. 708, 9 (1887).

Thus, it is clear that even then the Department forbade entries which were made *either* with the intent to *pass title* to a third party *or* to endow a third party with *some other interest or benefit.*

In 1890 Congress amended several of the public land laws, including the Desert Land Act, to provide that no person could acquire title to more than 320 acres of public land. Act of Aug. 30, 1890, 26 Stat. 391, *as amended*, 43 U.S.C. § 212 (1970).

In 1891 Congress further amended the Desert Land Act by providing that while assignments of entries could be made

> * * * no person or association of persons shall *hold by assignment or otherwise* prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands * * *. (Italics added.)

Act of March 3, 1891, 26 Stat. 1096, *as amended*, 43 U.S.C. § 329 (1970).

Finally, in 1908 Congress further amended the Desert Land Act to provide that:

> No assignment after March 28, 1908, of an entry * * * shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized.

Act of Mar. 28, 1908, 35 Stat. 52, *as amended*, 43 U.S.C. § 324 (1970).

It is clear that Congress was concerned that land actually be avail-

able to bona fide settlers. There are two basic methods by which that Congressional will could have been thwarted. First, large syndicates could take assignments from dummy entrymen and eventually acquire absolute title to the lands. This was prevented by the 1890 amendment which provided that no one could acquire title to more than 320 acres of public land, 43 U.S.C. § 212 (1970). Second, the syndicate could hold desert lands in the name of dummy entrymen without ever receiving title, but at the same time using the land for its own benefit and preventing bona fide settlers from making entry. This was prevented by the 1891 amendment which provided that one could not hold by assignment *or otherwise*, prior to the issuance of patent, more than 320 acres of public land. 43 U.S.C. § 329 (1970). It is true that prohibiting holding prior to the issuance of patent will in many cases prevent the acquisition of title to more than 320 acres of land. But to suggest that preventing the acquisition of title is the only purpose of the 1891 amendment is to suggest that Congress engaged in a futile and redundant act when it approved the 1891 amendment, for it had prohibited such acquisition of title only one year earlier in very precise terms. Indeed, the very fact that Congress used much broader language only one year later is indicative of a different purpose. What Congress feared was the control of large areas of desert lands by a few men to the exclusion of bona fide settlers. We conclude that "holding" means occupying, possessing, controlling, or receiving the major benefits from a desert land entry in such manner that both bona fide settlers and the entrymen of record are precluded from occupying, possessing, controlling, or receiving the major benefits of the entry before the issuance of patent. *United States v. Shearman*, 73 I.D. 386, 427, 428 (1966); *Solicitor's Opinion*, 72 I.D. 156, 166 (1965). We further conclude that the use of the phrase "by assignment or otherwise" lends emphasis to our conclusion that the 1891 amendment is remedial in nature and should be construed broadly to achieve that objective.[2] The word "otherwise" is nearly uniformly defined to mean "in a different manner; in another way, or in other ways." *Black's Law Dictionary* 1253 (4th ed. rev. 1968). *Webster's New International Dictionary* 1729 (2d ed. 1949). While this Department has recognized and applied the rule of *ejusdem generis*, it is completely inappropriate in this case. *Black's Law Dictionary* defines "*ejusdem generis*" in the following way:

> Of the *same* kind, class, or nature.
>
> In the construction of laws, wills, and other instruments, the "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned

[2] *See* 73 *Am. Jur.* 2d. *Statutes*, §§ 145, 153, 154, 157.

(citations omitted). The rule, however, does not necessarily require that the general provision be limited in its scope to the identical things specifically named. Nor does it apply when the context manifests a contrary intention. *Black's Law Dictionary* 608 (4th ed. rev. 1968).

The very use of the word "otherwise" manifests an intention to prohibit the holding of desert lands by assignment or by *any other means*. It is by definition, a word of inclusion, not a word of limitation.

We conclude that the phrase "hold by assignment or otherwise" means to possess, occupy, control, or receive the major benefit from desert lands by assignment or by any other means which will prevent either bona fide settlers or the entrymen of record from possessing, occupying, controlling or receiving the major benefits from desert lands.[3] *United States* v. *Law*, 18 IBLA 249, 260; 81 I.D. 794 (1974); *United States* v. *Shearman*, *supra*.

Appellants argue, however, that precedent of this Department not only precludes this Board from reaching this conclusion, but also supports their argument that the phrase "hold by assignment or otherwise" was intended only to prevent acquisition of title to more than 320 acres. We disagree. As we have seen, one of the concerns of the Congress was to prevent syndicates from controlling large parcels of public land for their own benefit even without gaining title. Most of the cases cited deal with the validity of assignments made before the issuance of patent. In deciding those cases the Department stated that the prohibition against holding more than 320 acres by assignment or otherwise would prevent one from acquiring title or the benefits of title by agreements, secret or otherwise, to assign the entry either before or upon the issuance of patent. That statement of the law is, of course, quite correct, but it in no way suggests that it is permissible to control desert land entries by means other than assignment. For example, in *Silsbee Town Company*, 34 L.D. 430 (1906), a case that arose before the 1908 amendments prohibiting corporations from holding entries, a corporation had made entry and filed an application to purchase desert lands. The Commissioner of the General Land Office had required the corporation to demonstrate that the individual stockholders were each qualified in their own right to make entry. Appellants cite the following language from that case to demonstrate that the 1891 amendment prohibited only the acquisition of title to more than 320 acres of desert land:

> The language of the act under which the application in question was made, touching the right of the applicant to take or hold land under its provisions, is plain: but no person or association of persons shall hold, by assignment or

[3] Appellants have submitted several other arguments which seem to draw distinctions where none exist. For example, at pages 7 and 8 of appellants' reply brief to appellee's answer brief, we find the following assertion: One does not hold under the Desert Land Law unless he has obtained, or is in a position to obtain, the entire interest of the entryman of record, for if he has not obtained the entire interest of the entryman, he is holding under the entryman, and not under the Desert Land Law.

otherwise prior to the *issuance of patent*, more than three hundred and twenty acres of such arid or desert land. (Sec. 7, act Mar. 3, 1891, 26 Stat. 1095.)

* * * * *

The language quoted clearly discloses the legislative intent that no person or association of persons shall obtain the benefit incident to the acquisition of title to more than 320 acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction. * * *

34 L.D. at 431; appellants' brief at 21.

The Secretary, when he used the phrase "benefit incident to the acquisition of title" was simply making reference to the fact that the stockholders would have received the benefit incident to the acquisition of title, *i.e.*, profit from the use of the land, and not the actual title. Actual title would have vested in the corporation. The Department's primary concern was not title, as such, but the "benefit incident to the acquisition of title," a concern which is consistent only with a broad interpretation of the 1891 amendment, and inconsistent with the narrow interpretation urged by the appellants.

Appellants have cited several other cases which deal with the same issue—the validity of holding by assignment prior to the issue of patent. *See, e.g.*, *Heinzman* v. *Letroadec's Heirs*, 28 L.D. 497 (1899); *J. H. McKnight Company*, 34 L.D. 443 (1906); *Edmond A. Fogarty*, 37 L.D. 567 (1909). While we regard the statements of law in those cases as correct, it is fairly clear that they are irrelevant to the issue of holding "otherwise"—by means other than assignment.

There remain, however, two opinions of more recent vintage which the appellants have urged us to treat as overruled, *Solicitor's Opinion, Idaho Desert Land Entries-Indian Hill Group*, 72 I.D. 156 (1965), and the decision in *United States* v. *Shearman*, 73 I.D. 386 (1966). Both deal with the same cases. A large number of individuals had made entry on desert lands in Idaho. After they had given up the idea of attempting to reclaim the land on their own, the entrymen entered into agreements with a corporation, Hoodco, that gave Hoodco the right to possess and farm the entries for a period of 20 years. Each entryman also agreed to sell his entry after patent for $10 per acre.[4] The Director of the BLM dismissed contests against the entries by decision of August 14, 1964. The Solicitor for the Department of the Interior recommended to the Secretary that contest proceedings should be reinstituted. In that opinion, he stated:

"Assignment," "hold" and "otherwise" are words of broad signification and their precise meanings depend on the context in which they are used. Sec. 1 of the act of March 3, 1877, *supra*, forbade entry of more than one tract by the same person. Sec. 5 of the act of March 3, 1891, speaks of the applicant

[4] The facts in *Shearman* are set forth at length in both court and departmental decisions and need not be restated here.

for patent "or his assignors," and section 7 authorizes the issue of patent to the entryman "or his assigns." The 1891 Act removed the prohibition against assignment of desert land entries. *United States* v. *Hammers*, 221 U.S. 220 (1911). The acreage limitation provisions of the 1877 Act would be inadequate to prevent excess holdings under the 1891 Act. The intent of Congress to prevent excess holdings is manifested in section 7 of the 1891 Act which prohibits holdings in excess of 320 acres "by assignment or otherwise."

It is not difficult to divine the congressional purpose in these statutes. Congress did not want holdings larger than 320 acres. We can construe the language used to effect that purpose without injury to the English language. The language of the statutes does not leave us powerless to prevent frustration of congressional purpose.

The Brief of Contestees and the decision of the Director equate "assignment or otherwise" as "assignment." The language of the statute is said in the Director's Decision to be the same as a statement that no person may "by assignment or other arrangement tantamount to an assignment become in effect an entryman." Such a construction ignores the meaning of the word "hold" and disregards the usual meaning of the term "assignment or otherwise." *30 Words and Phrases*, Perm. Ed., 500–501. This phrase is commonly found in the law and "otherwise" in the phrase means "in a different manner" or "in any other way." *In re Perry's Will*, 126 Misc. Rep. 616, 214 N.Y.S. 461, 463 (1926); *In re Iwers' Estate*, 225 Ia. 389, 280 N.W. 579 (1938).

Even if the arrangements described do not amount to an assignment, Hoodco "holds otherwise," that is, in another manner, more than 320 acres, in violation of the statute.

72 I.D. at 166.

The Secretary accepted the Solicitor's recommendation and ordered that contest proceedings be reinstituted against the entries. After a hearing, the Secretary accepted a recommended decision which found that each of the entries had been held by assignment:

Assignment as used in sections 2 and 7 is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries. The acquisition of such interest constitutes a holding within the meaning of the statute. In this case, the right to possess, reclaim, farm, retain the farming proceeds and pledge the entries, gave Hoodco Farms complete dominion over the entries for a period of 20 years and constituted a prohibited assignment and holding in excess of 320 acres of desert land.

73 I.D. at 428.

The Secretary's decision was appealed to the District Court for the District of Idaho. In its preliminary decision the District Court reversed the Secretary on each point. *Reed* v. *Hickel*, Civil No. 1–65–87 (filed March 13, 1970). That decision was in turn appealed to Court of Appeals for the Ninth Circuit. The Court of Appeals reversed the District Court on several points, *sub nom. Reed* v. *Morton*, 480 F.2d 634 (9th Cir. 1973), *cert. denied*, 414 U.S. 1064 (1973). The Court of Appeals stated:

The detailed findings of fact were prepared by Hoodco, after the district court filed a memorandum finding generally in Hoodco's favor. Despite the great weight to be accorded findings made by a trier of fact upon disputed contentions of fact, we cannot escape the conclusion that the district court here gave undue weight to the substantial investment of Hoodco in developing the lands. The court erroneously estopped the government from asserting valid legal grounds for setting aside the fraudulent transactions by which Hoodco acquired the lands in question.

480 F.2d at 639.

The specific finding which the Court of Appeals overruled was the finding by the District Court that there had not been a secret agreement by the entrymen to convey their entries after they obtained patent. 480 F.2d at 640. The Court of Appeals did not deal directly with the Secretary's conclusion that Hoodco held in excess of 320 acres, except to note that the Secretary had made such a finding. Appellants urge us to follow the finding of the District Court on that point, since the Court of Appeals did not explicitly overrule it. We do not regard the District Court's decision as binding, since it is apparent that the Court of Appeals upheld the Secretary's opinion on nearly every point. Indeed, as the Court of Appeals noted in reaching its conclusion:

> * * * However quixotic it may seem at this late date to say so, Congress never intended bargain-price desert land to be provided *for the benefit of* corporations or large landholders. (Italics added.) 480 F.2d at 641–642.

Appellants have also pointed out that the Department of the Interior has permitted desert land entrymen to allow other parties (notably hired farmers or tenant farmers) to derive some benefit from and to exercise control over their entries; consequently, appellants argue that holding "by assignment or otherwise" does not include their activities. Appellants further argue that since the Department cannot point out any one act which is in itself, illegal, they have not only not held the land in violation of the law, they have committed no fraud for which the entries could be canceled.

Since both arguments suffer from the same infirmity, we will deal with them together. It is, of course, true that the Department has stated that an entryman may mortgage his lands or even pay someone else to develop them. *See, e.g., United States* v. *Shearman*, *supra* at 426; *Williams* v. *Kirk*, 38 L.D. 429 (1910). A person may transfer most of his bundle of rights, known as property rights, to any number of people and still retain some interest in the property, as long as he retains some significant portion of that bundle of rights. This was the point made by Judge Mesch when he stated:

> * * * Even in the most flagrant situation where an entryman is a "complete dummy" for an undisclosed principle, one would expect that the nominal entryman would receive something simply for providing the use of his name. (Dec. at 36.)

[2] Now in the case of the complete dummy, the right to receive some payment has been retained. At some point, however, a person surrenders enough of his bundle of rights that the other party must be considered to "hold" the property. We have concluded that that point has been reached when the entryman, before the issuance of patent, surrenders possession, control, and most of the benefits of the entry. It is clear that possession, control, and benefits constitute nearly the whole bundle of rights known as property rights. It is also clear that an entryman can surrender part of the bun-

dle of rights without surrendering control. This is the case of the mortgage. An entryman may also hire someone to develop the lands, perhaps for a share of the crop. By so doing he surrenders some benefit. Finally, as in the case of *Williams* v. *Kirk*, *supra*, an entryman may engage one person to develop the lands and another to develop the irrigation system without ever surrendering enough of the bundle of rights to any one person that anyone other than the entryman could be considered to hold the land prior to the issue of patent. But, in this case, the entrymen surrendered possession, control and most of the benefit of the entries to the Grigg and Anderson partnership prior to the issuance of patent. Therefore, even if the various arrangements between the Grigg and Anderson partnership were to be considered separately and found not to be in violation of the law, when all of the arrangements are considered together there is little doubt that they add up to a holding by assignment or otherwise of more than 320 acres of desert lands[5] prior to the issuance of patent.

Appellants also argue that the United States is estopped from asserting the invalidity of the entries, since they maintain they relied to their detriment on prior decisions of this Department in developing their entries. Appellants cite a decision made by the Director of the BLM in August 1964. That decision involved the Indian Hills development, and, as previously noted, was overruled by the Secretary in *United States* v. *Shearman*, *supra*, and by the Court of Appeals for the Ninth Circuit in *Reed* v. *Morton*, *supra*. There is no doubt that the arrangements between the entrymen and the partnership in this case would have been permitted under the Director's decision. Between August 1964 and April 1965, when the Secretary first indicated that the decision of the Director of the BLM was in error, the partnership began and substantially completed the work of developing the lands involved in this case.

For a number of reasons, however, the doctrine of estoppel is not appropriate in this case. First, the Government may not generally be estopped from attacking illegality, especially in the case of public lands. *Reed* v. *Morton*, *supra*; *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917). Second, even if estoppel were appropriate in this kind of case, the doctrine would be unavailable to appellants because of their fraud in inducing the BLM to allow these entries. Judge Mesch stated the proposition very cogently:

> If a disclosure had been made to the Land Office that the individual entrymen were not the sole parties in interest and that the individual entrymen did not intend to reclaim the land for their own use and benefit, the Land Office could not properly have allowed the entries. The courts have consistently held that a failure to disclose facts, which, if disclosed, would result in a denial of a grant under the Public Land Laws renders the obtaining of

[5] We would suggest, however, that any agreement, such as a lease, which transfers possession, control, and substantial benefit for the entire statutory life of an entry will be considered a holding.

the grant fraudulent. *United States* v. *Trinidad Coal & Coking Company*, 137 U.S. 160 (1890); *United States* v. *Keitel*, 211 U.S. 370 (1908). * * * (Dec. at 47.)

This argument was advanced and rejected by this Board in the recent case styled *United States* v. *Law*, *supra* at 257.

The evidence discloses that entrymen cooperated with the Grigg and Anderson partnership in order to obtain the allowance of the entries. The entire project was made to appear as if it were entirely the plan of the entrymen and made solely in the interest of the entrymen. In fact, the plans submitted to the BLM to obtain allowance of the entries were completely ignored, once the entries were allowed. Neither was the relationship between the partnership and the entrymen revealed until after the entries had been allowed and the development of the land was complete. If the BLM had known that the partnership was to possess, control, develop the lands, and receive the major benefits of the entries, it could not have allowed the entries, since the plans of the partnership called for holding the lands by assignment or otherwise prior to the issuance of patent.

Appellant argues that the change in plans with respect to the project was due to technical necessity. We agree that an entryman may change certain technical aspects of his plans. We also agree that the BLM might have approved the technical aspects of the new plan, had it been privy to such knowledge. But the BLM could not have approved of the legal arrangements of which that plan was a part, since those arrangements would have amounted to an illegal holding of the land prior to the issuance of patent. We join the Court of Appeals for the Ninth Circuit in quoting Justice Holmes, "it is evident * * * that all hands proceeded on the notion that if the entrymen put in a periodical appearance on the land they would get it, and that no one troubled himself about actual intent provided that the affidavits were in due form * * *." *Jones* v. *United States*, 258 U.S. 40, 48 (1922), cited in *Reed* v. *Morton*, *supra* at 640.

[3] It is quite obvious from all of the evidence that the nominal "entrymen," other than the partners, contributed nothing to the project except their identities. They did not select the land, or even formulate the idea to become desert land entrymen. They expended no capital of their own except that which was provided by the partnership. They were not personally involved in the conception, implementation, or execution of the plan, nor did they even understand fully their own roles in it. They were virtual puppets, responding almost mechanically and uncomprehendingly to the will and direction of the partnership. They were motivated by the partners' assurance that eventually, if they cooperated by following instructions, they would get title to a valuable tract of land, and they were secure in their faith that their close kin would not

deliberately use them to their ultimate disadvantage.

In appellants' supplemental statement of reasons (at p. 125), with reference to the entrymen's assumption of financial liability, it is asserted, "This cannot mean anything except that the entrymen themselves reclaimed the lands in their entries; the partnership was merely the vehicle employed by them to accomplish that purpose." The vast bulk of the evidence convinces this Board that precisely the converse of that statement is more accurate, *i.e.*, that the partnership reclaimed the lands in the entries and the entrymen were merely the means which the partnership employed to accomplish that purpose. Desert land entries made for the use and benefit of others with intent to circumvent the provisions of the desert land laws must be regarded as fraudulent, and will be canceled.

This decision accords with our decision of even date herewith in *United States* v. *Morris*, 19 IBLA 350, 82 I.D. 146 (1975).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed and the entries are canceled.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

UNITED STATES

v.

G. PATRICK MORRIS, ET AL.

19 IBLA 350

Decided *April 7, 1975*

Appeal from a decision of Administrative Law Judge John R. Rampton, Jr., dismissing contest complaints against twelve desert land entries and refusing to order their cancellation.

Reversed.

1. Desert Land Entry: Generally

An arrangement by which an entity obtains mortgages on desert land entries and also obtains leases of a possible twelve year duration on the desert land entries, the result of which is the vesting of effective control of the entries in such entity, constitutes a holding within the purview of sec. 7 of the Act of Mar. 3, 1877, *as amended.*

2. Desert Land Entry: Generally—Words and Phrases

"Hold." Any person or entity which has acquired actual possession and the right thereof to more than 320 acres of desert lands "holds" such acreage within the meaning of the prohibition of sec. 7 of the Act of Mar. 3, 1877, *as amended.*

3. Desert Land Entry: Generally—Words and Phrases

"Otherwise." As used in sec. 7 of the Act of Mar. 3, 1877, *as amended*, "no person or association of persons shall hold by assignment of otherwise * * *," "otherwise" is not limited to other means equivalent to assignment but rather embraces all mechanisms whereby control of and benefit from an entry or entries are accumulated and transferred.

4. Desert Land Entry: Generally—Desert Land Entry: Cancellation

Violation of the prohibition against holding an excess of 320 acres constitutes a failure to comply with the requirements of law and such entries are properly canceled.

5. Desert Land Entry: Generally—Desert Land Entry: Cancellation

Estoppel will not lie against the Government where there is no showing that the parties to illegal agreements relied in any way on the statements or acts of Government officials.

APPEARANCES: William F. Ringert, Esq., Anderson, Kaufman, Anderson & Ringert, Boise, Idaho, for appellees; Riley C. Nichols, Esq., Office of the Solicitor, United States Department of the Interior, Boise, Idaho, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

INTERIOR BOARD OF LAND APPEALS

The Government appeals from the decision of Administrative Law Judge John R. Rampton, Jr., dated January 29, 1971, dismissing contests against twelve desert land entries and refusing to order the cancellation thereof.[1] The contests had been initiated in May of 1966 by the Idaho Land Office Manager, Bureau of Land Management. The contest complaints alleged that:

(a) Application for entry was not made in good faith in that (1) the contestee had no intent to reclaim, irrigate, and cultivate the land for his own use and benefit as required by section 1 of the Act of March 3, 1877, 19 Stat. 377, 43 U.S.C. sec. 321, and (2) the contestee, or others acting on his behalf, prepared and filed documents with the land office which concealed and falsified relevant facts and arrangements.

(b) The contestee entered into arrangements whereby his entry was assigned to and for the benefit of a corporation in violation of section 2 of the Act of March 28, 1908, 35 Stat. 52, 43 U.S.C. sec. 324.

(c) The contestee entered into arrangements whereby others held his entry, together with other desert entry land, in an aggregate of more than 320 acres in violation of section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 329.

(d) The contestee, or others on his behalf, filed proof papers which (1) concealed that the proof taking, the work on the entry land, and the application for entry, were for the benefit of others than the contestee, and (2) failed to show the reclamation, irrigation, and cultivation of the contestee's entry was performed as required by the Act of March 3, 1877 as amended, 19 Stat. 377, 43 U.S.C. secs. 321 through 329.

(e) The contestee failed to make the expenditures for the reclamation, irrigation, and cultivation of the entry lands as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. sec. 328.

(f) The contestee did not reclaim, irrigate, and cultivate the entry land as required by section 2 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. secs. 328, 329.

[1] The entries involved in this appeal are: G. Patrick Morris, I–013820; Joan E. Roth, I–013905; Elise L. Neeley, I–013906; Lyle D. Roth, I–013907; Vera M. Noble, I–014126; Charlene S. Baltzor, I–14128; George R. Baltzor, I–014129; John E. Morris, I–014130; Juanita M. Morris, I–014249; Nellie Mae Morris, I–014250; Milo Axelsen, I–014251; Peggy Axelsen, I–014252.

Timely answers were filed denying the allegations.

Extensive hearings were held commencing on June 26, 1967, and terminating on August 1, 1968, aggregating 38 days of testimony. Both parties thereupon submitted lengthy and detailed briefs. The Judge in his decision found for the contestees on every allegation in the Government's complaint. Specifically, he found that the entries had been made in good faith (Decision at 15–18 [hereinafter "Dec."]), the entries had not been assigned to a corporation nor did any individual "hold" more than 320 acres of land (Dec. at 18–26), the proof papers did not conceal relevant facts (Dec. at 26–29) and the entrymen made the necessary expenditures in reclaiming, irrigating and cultivating the lands (Dec. at 29–33). The Government timely filed a notice of appeal.

After careful consideration we have reached the conclusion that the Judge's decision is in error and must be reversed. A lengthy recitation of the factual disputes will not be necessary since the facts upon which our determination is based are not controverted. Our specific area of concern relates to the question of whether Sailor Creek Water Company held in excess of 320 acres of desert land in contravention of sec. 7 of the Act of March 3, 1877, *as amended*, 26 Stat. 1096, 43 U.S.C. § 329 (1970).

Prior to entry each entryman acquired a permit to appropriate the waters of the State of Idaho.[2] All the permits, with one exception, were then assigned to the Sailor Creek Land and Water Company of Nampa, Idaho, in June of 1963.[3] In August of 1963, the Sailor Creek Land and Water Company assigned all of the permits to the Sailor Creek Water Company of Twin Falls, Idaho. The Sailor Creek Water Company was the result of a joint venture entered into on July 5, 1963, by Hiller Engineering Corporation and Farmland-Idaho, Inc., both of which were subsidiaries of Hale Brothers Associates. Subsequently Farmland-Idaho, Inc., changed its name to Farm Development Corporation [FDC]. In September of 1964 the joint venture was terminated with Hiller Engineering transferring its shares in the Sailor Creek Water Company to FDC (Ex. C–CI, C–CJ). FDC, for reasons of convenience, continued to do business under the name of Sail-

[2] It should be noted that Milo Axelsen, Peggy Axelsen and Juanita Morris did not acquire a water permit for their lands. A permit for the lands embraced in Milo Axelsen's entry had originally been obtained by John E. Noble, Permit No. 31119. A permit for the lands embraced in Peggy Axelsen's entry had originally been obtained by Lucy M. Noble, Permit No. 31118. Permits for the lands embraced in Juanita Morris' entry had originally been obtained by Keith Taylor, Permit No. 31122, and Della Jane Taylor, Permit No. 31123. All four permits were assigned to Sailor Creek Land and Water Company of Nampa, Idaho, and eventually to the Sailor Creek Water Company of Twin Falls, Idaho (Ex. G–141; G–142; G–80 file 1 at 266–77).

[3] Elise Neeley's Permit No. 30983 was not assigned to the Sailor Creek Land and Water Company in June. Rather it was directly assigned to the Sailor Creek Water Company on July 23, 1963 (Ex. G–129).

or Creek Water Company (Prehearing Tr. at 26–27).

On August 7 and 9, 1963, the entrymen entered into Water Rights Contracts with the Sailor Creek Water Company (*See e.g.*, Ex. G–13). In these agreements Sailor Creek Water Company agreed to construct an irrigation system and supply the entrymen with water at the rate of $9.31 per acre foot. The entrymen agreed "to farm and irrigate [their entries] to the fullest extent of the acreage thereof as is consonant with good husbandry and farming practice . . ." (*See e.g.*, Ex. G–13 at 8–fa.) The total purchase price of the water right varied according to the acreage involved in the individual entries. Initial payment was to be made within thirty days of the allowance of the entry, with subsequent annual payments over the succeeding nineteen years.[4]

At the same time the entrymen and Sailor Creek Water Company entered into a mortgage of their entries for the sum of the purchase price of the water right, less the initial payment. (*See e.g.*, Ex. A of Ex. G–13 [hereinafter *Mortgage*].) Among the provisions of the agreement was a requirement that the mortgagors (the entrymen) pay all taxes and assessments (*See e.g.*, *Mortgage*, at 2–fa), and authorization for the mortgagee to enter upon and take possession of the entry, and receive all rents which were overdue in the case of any default on the agreement. (*See e.g.*, *Mortgage*, at 3–fa.) Finally, each mortgage contained the following provision:

> That the mortgagee, by accepting this mortgage, agrees that the obligation, obligations or debts secured by this mortgage shall be fully satisfied upon receipt of the proceeds of any sale had for the foreclosure of this mortgage and that such acceptance shall constitute a waiver of rights to any deficiency which may remain after the application of the proceeds of such sale. (*See e.g.*, *Mortgage*, at 4–fa.)

Copies of each of these mortgages were filed in the land Office on March 27, 1964.

On September 23, 1963, eleven of the entrymen leased their entries to the twelfth entryman, G. Patrick Morris, and to Allen T. Noble. (*See e.g.*, Ex. G–2, Doc. 34.) Each lease was for a term of two years with the right of two subsequent five year renewals. Section 3 of the lease provided that the lessors (the entrymen) pay all ad valorem taxes assessed upon the real property and comply with all of the terms, including payment, of the Water Rights Contract. All costs of planting were to be borne by the lessees. Similarly, the lessees exercised total control over the selection, growing and harvesting of crops. Section 9 of the lease agreement provided, *inter alia*, that:

> [t]he parties specifically agree that the lessees shall have the right to withhold from the annual cash rental payable to the lessor for the then current calendar year an amount equal to the installment of purchase price and interest due and

[4] The total amount varied from $59,648 for 320 acres to $48,464 for 280 acres. (*See generally* Ex. G–149, Doc. 0.)

payable from the lessor and spouse to the said Sailor Creek Water Company during such current calendar year under the terms of the aforesaid contract, and the lessees shall deliver any amount so withheld to the said Sailor Creek Water Company to the credit of the lessor and spouse in payment of the then current annual installment of purchase price and interest due from the lessor and spouse to Sailor Creek Water Company under the aforesaid contract, and such delivery shall constitute payment of the applicable annual cash rental to the extent of the amount so delivered. (*See e.g.*, Ex. G–2, Doc. 34 at 6–7.)

Lessees, of course, retained all revenue generated from the farming operations. The lessees were obligated to pay the lessors an annual rental sufficient to cover their required payments under the Water Rights Contract, foreseeable ad valorem taxes, and income taxes on the principal reductions of their outstanding debt to Sailor Creek Water Company. (See Tr. XXXVIII at 5855; Ex. G–149, Doc. A, A–15 at 6–7).[5]

On January 1, 1964, G. Patrick Morris leased his entry to the Sailor Creek Water Company (G–1, Doc. 33). On the same day, Allen T. Noble and G. Patrick Morris subleased the other entries to the Sailor Creek Water Company. Both the lease and the sublease were for a term of one year commencing January 1, 1964 (G–150, Doc. X, X–9). Noble and Morris were to receive one-third of the net profit derived from the sale of all crops grown and harvested. The Sailor Creek Water Company agreed to make all payments due under the original leases, and assumed all other obligations under the lease terms.[6]

On September 30, 1964, Morris assigned his undivided one-half interest in the other entrymen's leases to the Sailor Creek Water Company for the sum of $134,300, as well as an option to purchase two parcels of land (Ex. G–150, Doc. X, X–5). Simultaneous thereto, as security for payment, Sailor Creek placed in escrow a reassignment of the leases back to Morris. On February 18, 1965, Noble and the Sailor Creek Water Company reduced to writing an agreement made on October 22, 1964, in which Noble assigned to Sailor Creek Water Company his undivided one-half interest in the leases for $134,300 and an option to purchase two parcels of land (Ex. G–150, Doc. R, R–87).

On the same date that Morris assigned his one-half interest in the other entrymen's leases to the Sailor

[5] The Administrative Law Judge in his decision, stated that the cash rental was "$25 per irrigable acre for two years with option for two additional five-year periods of $22.50 and $30 per acre per year." (Dec. at 10.) The Judge apparently relied on a memorandum written by B. G. Miller, an officer of Hale Brothers Associates, which discussed a sliding scale of payments for the renewal years. (Ex. G–149, Doc. A, A–15 at 6–7.) That memorandum, however, employed the sum of $27.50 instead of $22.50. In any case, the actual leases specifically provided that the same rent would be paid for renewal years as that required for the original two year terms. (*See e.g.*, Ex. G–2, Doc. 34 at 4.)

[6] Through inadvertence the original sublease agreement embraced Morris' entry on S ½ sec. 8, T. 6 S., R. 9 E., B.M., which had been leased to Sailor Creek Water Company on Sept. 30, 1963. Therefore, on August 14, 1964, the sublease was amended to delete those lands. (Ex. G–150, Doc. X, X–8.) Three days later Morris assigned one-half of the rental owing on his lease to Allen T. Noble. (Ex. G–150, Doc. X, X–7.)

Creek Water Company, he also leased his own entry to the company for a one-year term with the right of two successive five year renewals (Ex. G–150, Doc. X, X–3).

Thus, by 1965 the Sailor Creek Water Company had a mortgage on all the entries, had leases with an eleven year possible life, had absolute authority to determine what would or would not be grown, oversaw all of the planting and harvesting operations, and retained all profits derived from these operations.[7]

[1–3] Section 7 of the Act of March 3, 1877, *as amended*, 26 Stat. 1096, 43 U.S.C. § 329 (1970), provides, in relevant part, that:

> * * * no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert land * * *.

The operative phrase of this section is "hold by assignment or otherwise." The Government cites the Departmental decision in *United States* v. *Shearman* [Indian Hill], 73 I.D. 386, 426 (1966) and the *Solicitor's Opinion, Idaho Desert Land Entries—Indian Hill Group*, M–36680, 72 I.D. 181 (1965), as support for its contention that appellants' actions have resulted in a violation of the proscriptions of the Act. The Judge ruled that the Sailor Creek Water Company, being in the position of a tenant, had not violated the prohibition of the Act.

There are three separate words the interplay of which must be analyzed to judge the correctness of the decision below: 1) "hold"; 2) "assignment" and 3) "otherwise."

The word "hold" has no fixed definition. Rather, its meaning can only be determined from the context in which it occurs with due regard for the legislative purpose animating its usage. *See United States* v. *Shearman*, *supra* at 427; *Navajo Tribe of Indians* v. *State of Utah*, 12 IBLA 1, 135–36, 80 I.D. 441, 507 (1973).

BLACK'S LAW DICTIONARY (4th ed. 1951) defines "hold" as follows:

> 1. To possess in virtue of a lawful title; * * * common in grants, "to have and to hold," * * *
>
> 2. To be the grantee or tenant of another; to take or have an estate from another. Properly, to have an estate on condition of paying rent, or performing service * * *

Id. at 864

The *Solicitor's Opinion*, *supra*, discussed the scope of the word "hold" as it appears in the statute and concluded that two elements must be present: (1) actual possession and (2) the right of actual possession. Under the leases involved herein, the Sailor Creek Water Company clearly had a right of actual possession. Indeed, section 1 of the Lease

[7] It should also be noted that on October 4, 1963, Peggy Axelsen entered into a ninety-nine year lease with the Sailor Creek Water Company for the NW ¼ SW ¼ sec. 2, T. 6 S., R. 9 E., B.M. for $25 per year. (Ex. G–12, Doc. 37.) On December 6, 1963, a similar lease was entered into for the SE ¼ SW ¼ sec. 2, T. 6 S., R. 9 E., B.M. (Ex. G–12, Doc. 38). As the Judge in his decision noted "the leases to Morris and Noble were still in effect so the 99-year leases never became effective and were cancelled in 1967." (Dec. at 11.) Cancellation, however, did not occur until after the initiation of contest proceedings.

Agreement, relating to the effective commencement of the leasing period, provides a mechanism for "the lessees to enter into possession of said premises and produce the normal crops which the lessees intend to grow on said premises. * * *" (*See e.g.* Ex. G–2, Doc. 34 at 3.) The Sailor Creek Water Company pursuant thereto entered into actual possession and proceeded to grow crops on the lands embraced by the entries.

Appellees, in their briefs to the Administrative Law Judge [*Brief of Contestees and Intervenor*] and to this Board [*Appellees' Answer*], argue at length that the *Solicitor's Opinion*, *supra*, is unsupported in either the case law or a careful analysis of the purposes and intent of the Desert Land Act. Their reading of the statute would limit the sweep of the word "hold" to ownership and disregard any interpretation which would embrace a leasehold interest.

Appellees contend that there is support for such a construction in the Coal Land Act, March 3, 1873, 17 Stat. 607, 608, 30 U.S.C. §§ 71–74 (1970), in the limitation, under the reclamation laws, of the amount of land assignable—one farm unit (*i.e.*, up to 160 acres)—prior to final payment of all charges for the land, sec. 13 of the Act of August 13, 1914, 38 Stat. 690, 43 U.S.C. § 443 (1970), in the acreage limitations found in sec. 3 of the Act of August 9, 1912, 37 Stat. 266, 43 U.S.C. § 544 (1970), and in the judicial and Departmental interpretations thereof.

We are not persuaded by the statutory comparisons advanced by appellees. Section 4 of the Coal Land Act provides, in relevant part, that:

> The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or *hold* any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or *hold* any other lands under their provisions; * * *

30 U.S.C. § 74 (1970).
(Italics added).

The cases which appelleees cited to the Judge below, in reference to the Coal Land Act, *see Brief of Contestees and Intervenor* at 190–93, suffer from two infirmities. First, the cases uniformly involve acquisition or attempted acquisition of title. Thus, the language of the decisions is naturally couched in phrases denoting acquisition. *See e.g.*, *United States* v. *Colorado Anthracite Co.*, 225 U.S. 219 (1912); *United States* v. *Keitel*, 211 U.S. 370, 388 (1908). But it does not follow that acquisition of legal title from the Government was the only thing prohibited by the section.

Secondly, the Coal Land Act was not a settlement Act but one aimed at the development of mineral resources. In contradistinction the Desert Land Act, while obviously envisaging development of desert lands, was designed primarily to provide a mechanism by which Government land could be obtained and settled by American citizens. Thus, the Desert Land Act has a dual

focus and even assuming a restrictive interpretation of "hold" under the Coal Land Act it would be improper to apply such a limiting definition to the Desert Land Act merely because such a reading has a validity under an unrelated Act.

The two sections of the reclamation laws are equally inapplicable herein. Section 13 of the Act of August 13, 1914, provides that:

> [n]o person shall hold by assignment more than one farm unit prior to final payment of all charges for the land held by him subject to the reclamation law, except operation and maintenance charges not then due.

43 U.S.C. § 443 (1970).

Section 3 of the Act of August 9, 1912, provides, *inter alia*, that:

> [n]o person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made * * * before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit * * *

43 U.S.C. § 544 (1970).

A number of points must be made as regards these two sections. First, appellees admit that there are no judicial or departmental cases affirmatively construing these two provisions as *not* encompassing leases. *Appellees' Answer* at 185–88. Their argument is based on silence, on failure to act against an alleged "matter of common knowledge within the Department of the Interior that there are numerous instances of single operators leasing and farming areas within federal reclamation projects * * * far in excess of one farm unit." *Appellee's Answer* at 185. Analysis of the concerns animating the limitations, however, shows that failure to proceed against lessees under the above quoted sections of the reclamation laws was the result of factors not present in the desert land laws.

One of the main purposes of the Reclamation Act was to break up existing large land holdings and prevent the establishment of future large holdings and thus assure that the benefits of the Act inured to the general public and not to a few wealthy landowners. *See generally Proposed Repayment Contracts—Kings and Kern River Projects*, 68 I.D. 372 (1961). They were both anti-speculative and settlement-oriented in general thrust. The implementation of the Act did not quiet, but rather exacerbated fears that large landowners were becoming the beneficiaries of reclamation activities to the detriment of the general American populace. The problem which continued to plague the reclamation laws was that of a large landowner, who would merely maintain his excess holdings until the cheaper lands around his holdings had been taken by earlier settlers. These excess lands did not receive water so long as the large landowners held them, but once sold to a qualified applicant the lands would become eligible. Thus, the large landowners struck upon the simple device of retaining excess holdings until the land values had risen, due to the potential availability of water, and then selling the

lands. The profits intended by Congress to flow to the individual settlers were, therefore, going instead to large landowners. By a series of amendments from 1912 to 1926 various stratagems were devised to require large landowners to divest themselves of what was seen as excessive land holdings.

The Acts of August 13, 1914, and May 25, 1926, were direct outgrowths of attempts to rectify the situation. *See generally Kings and Kern River Projects, supra*, at 384–96. The evils of leasing, when perceived at all, were seen in a context of large landowners leasing to tenants. It was not the lessee who was violating the intent of the Act but the subsisting ownership by which the landowner acquired the benefits of the reclamation law. As was noted by a special advisory committee in its report dated April 10, 1924:

> The tenant is not desirable on the Federal irrigation projects, for the reason that these projects were authorized with the home-building idea as the central consideration. It was hoped that those who entered upon the projects would do so with the purpose of making permanent homes for themselves and their families. Under a system of tenantry, the farm merely becomes a long-distance investment, the profits from which, if any, are used to maintain the family in the city or at least at considerable distance from the farm.

S. Doc. 92, 68th Cong., 1st Sess. at 133.

Little, if any, weight can be given the fact that the Department has not historically proceeded against tenants in reclamation lands for violating the "holding" requirement specified in the statute. Enforcement of the reclamation laws has always been directed at assuring that the *benefits* of reclamation inured to those whom Congress sought to aid. Tenants were not seen as reaping such benefits and it is understandable that no actions against them were undertaken.[8]

Appellees also contend that past Departmental and judicial interpretations of the Desert Land Act militate against acceptance of the view that leasing is within the ambit of the proscription against "holding." Great reliance is placed by both appellees and the Administrative Law Judge on *Silsbee Town Company*, 34 L.D. 430 (1906). That case arose prior to the prohibition of corporate entries codified in 43 U.S.C. § 324 (1970) and involved the authority of the Department to go behind the corporate structure of a corporation seeking to make a desert land entry in order to examine the individual qualifications of the individuals composing it. In the course of an opinion affirming the authority of the Department to pierce the corporate veil and examine the individual makeup of corporations the decision stated:

> [t]he language quoted [43 U.S.C. § 329] clearly discloses the legislative intent that no person or association of persons shall obtain the benefit *incident to the acquisition of title* to more than 320

[8] In a subsequent submission, received September 19, 1974, appellees cited *Blight's Lessee v. Rochester*, 21 U.S. (7 Wheat.) 535 (1822) and *Rector v. Gibbon*, 111 U.S. 276 (1884). We have examined those two cases but find them unpersuasive on the issues before us.

acres of land under the desert-land law, and it was not the intention to permit a person to exercise directly, in an individual capacity, the benefit conferred, and in addition, obtain a like benefit, by the indirect exercise of the same right through the instrumentality of a legal fiction * * *. (Italics added.)

Italics is placed on the use of the phrase "acquisition of title." Inasmuch as the *Silsbee* case involved the making of a corporate *entry* it is manifestly logical that the decision is couched in terms denoting ownership. Once again we do not feel it proper to draw a negative inference from the fact that the decision referred only to the acquisition of title in discussing the "holding" proscription.

We stated, *supra*, that "hold" can only be correctly construed by reference to the context in which it appears with due regard for the legislative intent implicit in its utilization. Section 1 of the original Desert Land Act, Act of March 3, 1877, 19 Stat. 377, provided:

> * * * no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres * * *.

While the Act of August 30, 1890, 26 Stat. 391, reduced the amount of land available for individual entry to 320 acres, it had no effect on the essential prohibition. A consistent course of Departmental decisions prior to the enactment of the Act of March 3, 1891, *supra*, had established the principle that the Congressional prohibition against entry in an excess of 640 acres could not be defeated by either an original entry or assignment of an entry.[9] Thus, while the 1891 Act authorized assignments which had theretofore been prohibited, clear Departmental policy had already established limitations on assignments to the maximum authorized amount of one tract of land. *See David B. Dole*, 3 L.D. 214 (1884).

Adoption of appellees' interpretation would thus result in a finding that Congress, in enacting sec. 2 of the Act of March 3, 1891, had simply re-promulgated the prior existing law. Furthermore, if, as appellees contend, "assignment" had a fixed and established meaning as of 1891 (*Brief of Contestees and Intervenor* at 133–43) it is difficult to see why Congress did not simply state that "no person or association

[9] *See Joab Lawrence*, 2 L.D. 22 (1884); *Peter French*, 5 L.D. 19 (1886). The Department had originally held that desert land entries were assignable, but in 1880 reversed this holding and held that such entries were not assignable. *S. W. Downey*, 2 *Copps* (1882 Ed.) 1381 (April 15, 1880). The Department subsequently held that assignments made in reliance upon the initial erroneous interpretation would be recognized, but only to the extent of one tract of land, *i.e.*, 640 acres. *David B. Dole*, 3 L.D. 214, 216 (1884). The Act of March 3, 1891, *supra*, effectively nullified the Department's interpretation of the 1877 Act as prohibiting all assignments. *See Luther J. Prior*, 32 L.D. 608 (1904).

It could, therefore, be argued that the 1891 Act far from expanding a holding prohibition beyond that embraced by "assignment" was merely permitting actions formerly prohibited under the Act of March 3, 1877. Such an analysis ignores the fact that to the extent that the Department had allowed recognition to be given to assignments in the *Dole* case it had specifically held that no more than one tract of land might be taken by such *assignment*. "Assignment" was thus a known quantity and had Congress intended to limit the holding provision to assignments there would have been no necessity to add the phrase "or otherwise."

of persons shall hold by assignment prior to the issuance of patent, more than three hundred and twenty acres of such arid or desert land." The only ostensive reason which appellees' advance for the inclusion of the phrase "or otherwise," namely, "other means equivalent to assignment," implicitly rests upon an assumption that enforcement of the prohibition against assignments is limited to only those instances in which entrymen call their transactions "assignments." But the general rule has always been that "courts look beyond mere names and within to see the real nature of an agreement, and determine from all its provisions taken together, and not from the name that has been given to it by the parties or from some isolated provision, its legal character and effect * * *." *United States* v. *Shearman*, *supra* at 426, citing *Arbuckle* v. *Gates*, 95 Va. 802, 30 S.E. 496 (1898).

Finally, we believe that statutory analysis compels the conclusion that more than title transfer is prohibited by sec. 329. The entire proscription is against holding, *prior* to the issuance of patent, an excess of 320 acres. Since legal title remains in the United States until patent, limiting the prohibition to transfer of ownership would make the act an effective nullity. Rather we believe it covers situations involving agreements to transfer title once acquired as well as arrangements which result in the accumulation or transfer of effective control of and benefit from land in excess of statutory restrictions prior to issuance of patent. *See United States* v. *Shearman*, *supra* at 428.

Turning to "assignment" we note that the Department in the *Indian Hill* case determined that: "[a]ssignment as used in [sec. 329] is, therefore, concluded to mean such interest or partial interest as will result in effective control of and benefit from the entry or entries." 73 I.D. at 428. The Ninth Circuit Court of Appeals in *Reed* v. *Morton*, 480 F.2d 634 (1973), *cert. denied*, 414 U.S. 1064, affirmed the finding that the actions of the entrymen therein constituted prohibited assignments. Heavy emphasis, however, was placed upon the fact that "the entrymen understood * * * that they were transferring their interests to the developers for $10 an acre, and that they did not regard themselves as having any interest in the land after this meeting." *Id.* at 640.

In the instant case the Administrative Law Judge found that:

> None of the entrymen agreed to sell the land in their entries after patent. Nor does the record contain testimony or documentary evidence which would infer that any entryman had agreed to sell the land in his or her entry.

(Dec. at 23.)

Assuming, arguendo, the lack of an agreement to transfer the lands after issuance of patent it is unnecessary for us to decide whether these actions nevertheless effectively constitute an assignment. *But see United States* v. *Alameda P. Law*, 18 IBLA 249, 81 I.D. 794 (1974). The entire phrase is "assignment or

otherwise." (Italics added.) Regardless of what ever technical argument can be mounted over the meaning of "assignment," we believe appellees must run afoul of the more embracing concept embodied in "otherwise."

Appellees argue strongly that the doctrine of *ejusdem generis* should be applied so as to limit the scope of "otherwise" to, "other means equivalent to assignment." *Brief of Contestees and Intervenor* at 200 g. Appellees' analysis suffers from two discrete infirmities.

First, the doctrine of *ejusdem generis* is not applicable. Shortly stated, the rule provides that where words of general import follow words of specific and particular meaning, the general words are not extended to their widest limits but are rather limited in meaning to the general class of the words specifically mentioned. Thus, *ejusdem generis* is merely a narrower construct of the maxim *noscitur a sociis*, *i.e.*, the meaning of the word may be known from accompanying words. But use of the word "otherwise" in the statute before us negates appellees' contention, since we are not faced with a succession of specific words but merely a single specific word. "Otherwise" by its nature implies a differentiation from words conjoined. *Black's Law Dictionary*, *supra*, defines "otherwise" as "[i]n a different manner, in another way, or in other ways." *Id.* at 1253. *See e.g. Dunham* v. *Omaha & Council Bluffs St. Ry. Co.*, 106 F.2d 1, 3 (2d Cir. 1939); *Newport Air Park, Inc.*, v. *United States*, 293 F. Supp. 809, 811 (D. R.I. 1968). Appellees would invoke a doctrine of construction, of questionable utility in the instant case, to nullify the plain meaning of a simple word. But a basic tenet of all statutory construction is that words are construed in their ordinary meaning. *Mason* v. *United States*, 260 U.S. 545 (1923). Appellees' interpretation would negate the entire meaning of the word. *See generally Sutherland, Statutory Construction* §§ 47.17–47.22.

Even more importantly the meaning of "otherwise" is largely controlled by the meaning of "hold." Appellees, by adopting a narrow construction of the word "hold," argue that "otherwise" by its nature is circumscribed so as only to cover "means equivalent to assignment." Taking a less restrictive view of the meaning of "hold," however, immediately leads to a definition of "otherwise" which is more inclusive in ambit. We have discussed above the reasons for rejecting the definition of "hold" advanced by appellees, and no purpose would be served by a reiteration of the reasons given for adopting a definition which includes all mechanisms whereby control of and benefit from the entries are accumulated or transferred. Clearly, the structure of control exhibited by the documentary submissions of both parties leads to the inescapable conclusion that Sailor Creek Water Company with the aid of the individual entrymen violated

the prohibition against holding an excess of 320 acres of desert land prior to the obtaining of patent.

[4] Appellees contend that cancellation of the entries, even assuming a violation, would be improper for two reasons. First, they argue that a violation of the holding requirement is not a proper ground upon which to cancel the entries. *Brief of Contestees and Intervenor* at 265–74. Section 2 of the Act of March 3, 1891, 43 U.S.C. § 329, provides, in relevant part, that desert land entries:

> * * * shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or *failure to comply with the requirements of law*, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States. (Italics added.)

Appellees contend that the italicized provision applies only to positive requirements of the law, *e.g.*, cultivation of ⅛th of the entry within four years, but does not reach the negative prohibitions of the holding limitations. Such an interpretation can scarcely be credited, particularly since the Ninth Circuit Court of Appeals in *Reed* v. *Morton*, *supra*, specifically held that violations of the prohibition against assignments to corporations, also a negative prohibition, warranted cancellation of the entries. We find that a holding in excess of 320 acres is a failure to comply with the requirements of law such as would require cancellation of the entry.

[5] The appellees also contend that the Government should be estopped from invalidating the entries. Their brief to this Board states:

> * * * all the transactions which occurred between the entrymen and the water company or Morris and Noble were presented to the BLM either as part of the applications or as part of the feasibility report or in discussions with BLM representatives or as part of the supplemental proof submitted by each entryman. At the times it received the various items of information the BLM was obligated to advise the entrymen that it considered the transactions as constituting assignments which it could not recognize. *Appellees' Answer* at 225.

While their argument is specifically directed at a finding of assignment, it is equally applicable to a violation of the holding requirement "by assignment or otherwise." Initially, it should be noted that the Government, as a general rule, is not estopped to attack illegality. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *Reed* v. *Morton*, *supra*, at 643 (1973). The situations which estoppel will lie against the Government have been strictly circumscribed by various court decisions. *See e.g.*, *Brandt* v. *Hickel*, 427 F.2d 53 (9th Cir. 1970); *United States* v. *Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973). In *Marathon Oil Co.*, 16 IBLA 298, 81 I.D. 447 (1974), this Board exam-

ined at some length the parameters within which the exception to the general rule is operative. Therein, we stated that an exception is recognized where: "(1) the erroneous advice is in the form of a crucial misstatement in an official decision; (2) the result of the misstatement violates standards of fundamental fairness; and (3) the public's interest is not unduly damaged by the imposition of the estoppel." *Id.* at 316, 81 I.D. at 455.

Appellees' contentions are clearly insufficient to invoke estoppel under the criteria set out above. They point to no "crucial misstatement in an official decision." Rather, they argue that they relied upon a failure of Governmental employees to inform them of the illegality of their actions. One could scarcely expect the Government to caution parties against illegal acts when such acts are not brought to the Government's attention until after their consummation. The illegal act involved herein was the result of the totality of the arrangements entered into between the entrymen and Sailor Creek Water Company. The Government was not informed of the terms of the lease agreement until after it made a specific request for the information (*See e.g.*, Ex. G–2, Doc. 33). The leases had, in fact, been entered into the previous year, and had already been subleased for a one year term to Sailor Creek Water Company. Having failed to inform the Government of the totality of their arrangements, appellees cannot be heard to argue that the Government's failure to warn them of their illegality supports the invocation of estoppel. Having examined the record before us, we find no alternative but to order the rejection of the final proofs tendered and cancellation of the entries.

As this holding is dispositive of the case, we find it unnecessary to rule on the other holdings in the decision of the Administrative Law Judge, or on the merits of the arguments of appellants thereon. This decision accords with our holdings in *United States* v. *Golden Grigg*, 19 IBLA 379, 82 I.D. 123 (1975), decided this date.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Administrative Law Judge is reversed, the final proofs are rejected and the case files are remanded for cancellation of the entries.

DOUGLAS E. HENRIQUES,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

IN THE MATTER OF OLD BEN COAL CORPORATION (NO. 24 MINE)

4 IBMA 104

Decided *April 10, 1975*

Application for Review and Civil Penalty Proceedings.

1. Federal Coal Mine Health and Safety Act of 1969: Parties: Failure to Participate

Where a party to an application for review proceeding under section 105 of the Act deliberately and persistently fails to participate in such proceeding before the Administrative Law Judge, it may be dismissed as a party within the discretion of the Judge or the Interior Board of Mine Operations Appeals. 30 U.S.C. § 815 (1970).

APPEARANCES: Steven B. Jacobson, Esq., for United Mine Workers of America; Thomas H. Barnard, Esq. and Michael C. Hallerud, Esq., for appellant Old Ben Coal Corporation.

MEMORANDUM OPINION AND ORDER DENYING MOTIONS FOR SUMMARY DISMISSAL AND MOTIONS TO STRIKE

On March 31, 1975, the United Mine Workers of America (UMWA) filed motions for summary dismissal pursuant to 43 CFR 4.601(a) with regard to the respective Application for Review portions of each of the above-captioned appeals brought by Old Ben Coal Corporation (Old Ben) to challenge determinations by an Administrative Law Judge upholding the validity of withdrawal orders issued pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the Act). 30 U.S.C. § 814(a) (1970). By way of response, Old Ben moved the Board on April 2, 1975 to strike the UMWA's motions for summary dismissal on the ground that the UMWA is no longer a party to the subject appeals, its previous motion to intervene having been denied. On April 4, 1975, the UMWA filed a response to Old Ben's motion.

The pertinent background facts are undisputed. Following initiation by Old Ben of the subject review proceedings, the UMWA filed responsive Answers, denying, as did the Mining Enforcement and Safety Administration (MESA), the allegations of Old Ben's Applications for Review. Thereafter, and despite due notice, the UMWA chose *not* to participate at any stage of the proceedings before the Administrative Law Judge. The UMWA did not submit a Preliminary Statement, did not appear at the evidentiary hearing, did not present any information, and did not file Proposed Findings of Fact and Conclusions of Law.

Following the timely filing of Notices of Appeal to this Board by Old Ben with respect to the consolidated application for review and penalty dockets in the above-captioned appeals, the UMWA filed motions for leave to intervene in the penalty portions of the sub-

ject cases. By order dated January 8, 1975, the Board denied the UMWA's motion for failure to make *any* showing, as required under 43 CFR 4.513, that its participation would meaningfully assist in the formulation and resolution of the issues on appeal.

Subsequently, Old Ben timely filed its briefs on the merits on February 3, 1975. It served a copy on MESA, but did not serve a copy on the UMWA.

Section 4.601(a) of 43 CFR provides that any appellant's appeal is subject to dismissal if it fails to timely serve its brief on an opposing party. Under this regulation, dismissal is discretionary with the Board.

The Board has decided to deny Old Ben's motion to strike because it believes that motion to be ill-founded. The previous (January 8, 1975) order of the Board denying the UMWA leave to intervene, upon which Old Ben relies, is irrelevant. It dealt solely with the penalty dockets in these respective appeals and had no impact whatsoever on the UMWA's status in the Application for Review proceedings.

The Board has also decided to deny the UMWA's motions for summary dismissal. The Board is of the view, and so finds, that the continued failure of the UMWA to make known its position during the course of the hearings, and its failure to participate therein were certainly sufficient to give Old Ben good reason to believe that the UMWA had no further interest in the proceedings. Consequently, we do not believe the UMWA is in any posture to complain of Old Ben's failure to serve the union with a copy of its brief on appeal under 43 CFR 4.601 (a).

[1] There remains, however, the question of the UMWA's status in these appeals. Section 4.507(c) of 43 CFR provides as follows:

> (c) Where a person who is a statutory party, as described above, has not filed a pleading on or before the time permitted for the filing of an initial responsive pleading, except in a penalty proceeding that person shall no longer be considered a party to the proceeding unless otherwise ordered by the Administrative Law Judge or the Board. Such person shall not thereafter be entitled to participate as a party in such proceedings and shall not thereafter be entitled to service of further pleadings or documents in the proceeding, unless the Administrative Law Judge or the Board for good cause shown permits such person to intervene in the proceeding.

The above-quoted regulation is not by its terms exclusive and it does not purport to define the minimum litigating responsibilities of a party.

Section 105(a)(1) of the Act which provides an opportunity for a public hearing at the request of the operator or the representative of miners in review of notices and orders, and provides that whichever is the applicant shall serve a copy of its application on the other, goes on to provide in pertinent part:

> * * * to enable the operator and representative of miners in such mine to *present information* relating to the issuance

and continuance of such order or the modification or termination thereof * * *. (Italics added.)

Thus, in applications for review of notices and orders, the statute confers a *right* to either the operator or the representative of miners, as appropriate, to participate in any hearing held on these matters. In order to exercise this right to participate, the Secretary has provided by regulation that the person seeking to participate must file an initial responsive pleading. This is the bare minimum required to qualify as a party eligible to participate in the hearing. Once having exercised its right to become a full-fledged party to a proceeding, there is a concomitant duty upon such party to participate in the proceeding at least to the extent of making its position clear to the other parties to the proceeding and to the Administrative Law Judge. In failing to participate or to present any information, a party runs the risk of being dismissed either by the Judge or this Board. The representative of miners has no greater, or lesser, right or duty in this respect than any other party to the proceeding. The Administrative Law Judge is entitled to know what the position of the representative of miners is on the issues before him so that he may take them into account in preparing his initial decision, which is the basis for appeal to this Board. It is unfair to the Judge, the other parties to the proceeding, and to this Board for a party to deliberately stand mute during the entire course of a hearing and then seek to participate in an appeal from an initial decision in which it played no part in helping formulate.

In the case at hand, it clearly appears that the UMWA has deliberately failed to fulfill the minimum responsibilities required to maintain its status as a party in these proceedings. In cases such as this, we hold that both the Judges and this Board have discretionary authority as adjudicative tribunals to dismiss a party under the power "* * * to manage their own affairs so as to achieve the orderly and expeditious disposition of cases * * *." *See Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 630 (1962), affirming 291 F.2d 542, 545 (7th Cir. 1961); *compare Flaksa* v. *Little River Marine Construction Co., Inc.*, 389 F.2d 885 (5th Cir. 1967), *cert. denied*, 392 U.S. 928 (1968); 43 CFR 4.582 (a)(5), (a)(7), (b)(4), 4.605.

Therefore, the Board holds that the UMWA, not having "presented information" within the meaning of section 105(a) of the Act, and having failed to pursue its rights as a party to the proceedings below, has forfeited its rights to status as a party and should be dismissed from these appeals. However, in view of the fact that the Board has not heretofore had occasion to rule on this matter, we are willing to permit the UMWA to file an *amicus curiae* brief in accordance with our order herein. Copies of the appellate briefs of the parties received thus far will be sent to the UMWA

by the Board with a copy of this memorandum and order.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Motions for Summary Dismissal by the UMWA and the Motions to Strike by Old Ben ARE DENIED and the UMWA is dismissed as a party in the above-captioned review proceedings. IT IS FURTHER ORDERED that the UMWA IS GRANTED leave to file a brief at its option in the Application for Review portion of these proceedings as an *amicus curiae* on or before April 21, 1975.

C. E. Rogers, Jr.,
Chief Administrative Judge.

David Doane,
Administrative Judge.

ARDEE COAL COMPANY

4 IBMA 112

Decided *April 16, 1975*

Appeal by Mining Enforcement and Safety Administration (MESA) from an order of Administrative Law Judge Edmund M. Sweeney (Docket No. BARB 74-522-P), dated December 31, 1974, dismissing a Petition for Assessment of Civil Penalty filed by MESA pursuant to section 109(a) of the Federal Coal Mine Health and Safety Act of 1969[1] hereinafter "the Act."

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

Where an operator is held in default an Administrative Law Judge errs in dismissing the proceeding for assessment of civil penalties without making a determination on the merits that no violation of the Act has occurred.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, John D. Austin, Jr., Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Ardee Coal Company, appellee, has not participated in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On November 17, 1971, Ardee (Ardee) Coal Company, was cited for four alleged violations of the Act.[2] The conditions cited were required to be abated by Nov. 24, 1971. On Nov. 26, four Orders of Withdrawal, pursuant to section 104(b) of the Act were issued for failure to abate within the time fixed on

[1] 30 U.S.C. § 819(a) (1970).

[2] Notice of Violation 2 CRS November 17, 1971—30 CFR 77.504. Notice of Violation 3 CRS November 17, 1971—30 CFR 77.511. Notice of Violation 4 CRS November 17, 1971—30 CFR 77.513. Notice of Violation 5 CRS November 17, 1971—30 CFR 77.701.

the Notices. The Orders noted that the mine had been abandoned. The Mining Enforcement and Safety Administration (MESA) on February 26, 1974, filed a Petition for Assessment of Civil Penalties against Ardee for the four alleged violations. On Apr. 4, 1974, service of the petition on Roy Jackson, owner, was accomplished. Under date of June 10, 1974, the Judge issued an order to show cause why a default should not be entered addressed to Ardee Coal Company pursuant to 43 CFR 4.544(a). The show cause order was not satisfied, thereby invoking the provisions of 43 CFR 4.544 for summary disposition of the proceeding. MESA, at the request of the Judge, on November 19, 1974, furnished proposed findings including information on the assessment criteria set forth in section 109(a) of the Act together with suggested penalties totaling $199 for the four violations. In his decision issued December 31, 1974, the Judge denied the Petition for Assessment of a Civil Penalty and dismissed the proceeding.

The Judge in his decision commented on the fact that the penalty proceeding was not initiated by MESA until two years and four months after the Notices of Violation were issued. He continued by saying:

> * * * The purpose of that Act is to protect the health and safety of the Nation's coal miners; and to do this by requiring compliance with the mandatory standards promulgated thereunder.
>
> The Act cannot be served by waiting for over two years to seek a penalty against the operator of an 8-miner mine with a history of 24 previous violations. A civil penalty to be a just and effective sanction and deterrent must be adjudicated promptly and fully. When the Congress enacted the language of section 109(a)(1) that the operator of a coal mine in which a violation occurs of a mandatory health and safety standard shall be assessed a civil penalty by the Secretary under 109(a)(3), it did not contemplate the incomplete investigation that characterizes the case here. The further processing in this case under these circumstances would offend the legal principle of *de minimis*. A penalty, if assessed here, could not now represent either prompt application of the Act or a practical means of deterring further and future violations thereof by this operator in whatever capacity.

In fairness to the Act, this proceeding must be dismissed.

In this appeal, MESA contends that the Judge erred in dismissing the proceeding without making a determination that no violations had occurred and in denying its petition for assessment of penalties and subsequent failure to assess penalties based upon the record before him. MESA requests that the Board reverse the decision of the Judge, find that the four cited violations of the Act did occur, and assess civil penalties based on the record.

Issues Presented

Whether the Judge erred in dismissing the proceeding for assessment of penalty for four alleged violations of the Act without determining that no violations of the Act had occurred.

Whether the Judge erred in deny-

ing MESA's petition for assessment and in failing to assess penalties.

Discussion

Section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (Act), requires the assessment of penalty for each violation of the Act.

In *Mountaineer Coal Company*, 3 IBMA 472, 81 I.D. 740, 1974–1975 OSHD par. 19,165 (1974), at page 479 the Board stated:

> We observe that section 109(a)(1) of the Act constitutes a mandate to the Secretary to assess a civil penalty against the operator of a coal mine in which a violation of a mandatory health or safety standard occurs. It is, therefore, our further opinion that it is incumbent upon the Administrative Law Judge to avoid, when possible, procedural rulings which have the effect of foreclosing the Secretary's enforcement agency (MESA) *from litigating penalty cases on their merits.* (Italics supplied.)

In a similar vein the Board in *Armco Steel Corporation*, 3 IBMA 482, 487; 81 I.D. 744, 1974–1975 OSHD par. 19,151 (1974), stated in pertinent part:

> * * * Due to the Judge's dismissal of these Petitions for Assessment prior to hearing and decision on the merits, the question of whether a violation occurred is unanswered. If, in fact, a violation did occur, the Judge, by dismissing these cases, would be violating the Act's mandate of assessing penalties when violations occur.

[1] In the circumstances of the case at hand the Judge determined that Ardee was in default and had waived its right to a hearing by its failure to respond in accordance with the provisions of 43 CFR 4.544(a). Based upon the fact that Ardee had received from MESA the Notices of Violation which cited, in each instance, the mandatory health or safety standard allegedly violated and contained a narrative statement of the condition or practice found by the inspector plus a notation that it was served on Roy D. Jackson at the mine office, we think the Judge should have determined whether or not the alleged violations occurred (see 43 CFR 4.544(a)). Accordingly, we hold that the Judge, under these circumstances, erred in dismissing the proceeding and denying this Petition for Assessment of Civil Penalties without determining that the alleged violations had not occurred. The Judge's dismissal of this action and denial of the petition without such determination is inconsistent with the Congressional mandate that a penalty must be assessed, where a violation is found.

We now turn to MESA's contention that the record is sufficient for this Board to make such findings and to assess an appropriate civil penalty. We agree that the record is sufficient for us to do so.

In addition to the findings of fact as to each violation submitted by MESA, we have considered the following provision of 43 CFR 4.544(a):

> * * * If the order to show cause is not satisfied as provided in the order, the respondent will be deemed to have waived his right to hearing and the administrative law judge may assume for purposes

of the assessment: (1) That each violation listed in the petition occurred; and (2) the truth of any fact alleged in any order or notice concerning such violation. * * *

Consonant with the foregoing we find that alleged violations of the Act are established and adopted, in the following pertinent parts, MESA's proposed findings and recommended civil penalties:

Notice of Violation 2 CRS 11–17–71 alleges a violation of 30 CFR 77.504 in that the electrical connections and splices in the electric conductors were not mechanically and electrically efficient in the 220 volt alternating-current power wires to the three (3) battery chargers, coal dump lights, and mine office lights. We find that the violation was serious since there was a danger of fire, electrical shock and burns and that the operator was negligent in not checking the connections for efficiency and in not replacing poor connections. A penalty of $51 is assessed.

Notice of Violation 3 CRS 11–17–71 alleges a violation of 30 CFR 77.511 in that a danger sign was not posted at the rectifier station. We find the violation serious, since unauthorized personnel in the area would be unaware of the hazard and could suffer electric shock or electrocution as a result of tampering with the rectifier, and the operator negligent, since a reasonable and prudent operator should be aware of these dangers and properly post the area. A penalty of $28 is assessed.

Notice of Violation 4 CRS 11–17–71 alleges a violation of 30 CFR 77.513 in that insulating mats or other electrically nonconductive material were not provided at the rectifier and three (3) battery chargers. We find the violation serious, since touching a switch while standing on conductive material could causes shock or electrocution, and the operator negligent, since he should have known of the hazard involved and should have provided suitable protection. A penalty of $43 is assessed.

Notice of Violation 5 CRS 11–17–71 alleges a violation of 30 CFR 77.701 in that two (2) battery chargers and a grinder were not frame grounded. We find the violation serious, since energization of the frames could subject persons coming in contact therewith to shock or electrocution. We also find the operator to have been negligent, since he should have known the hazards posed by this ungrounded equipment. A penalty of $71 is assessed.

The penalties assessed are appropriate to the size of the operator's business and in the absence of any showing to the contrary will have no effect on the operator's ability to continue in business. Ardee Coal Company, No. 2 Mine, is located at Crummies, Harlan County, Kentucky. The mine has eight employees and produces 50 tons daily and 10,000 tons yearly. However, we note that the mine had been abandoned at the time the withdrawal orders were issued. Accordingly,

the element of good faith in abatement is of no significance and is not considered.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS ORDERED that:

1. The decision of the Administrative Law Judge dated December 31, 1974, IS REVERSED; and

2. Ardee Coal Company pay a total assessment of $199 for four (4) violations of the mandatory standards on or before 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

OHIO MINING COMPANY

4 IBMA 121

Decided *April 17, 1975*

Appeal by the Mining Enforcement and Safety Administration from an Order of Administrative Law Judge George H. Painter, dated November 18, 1974, dismissing a civil penalty proceeding against the Ohio Mining Company in Docket No. MORG 74-519-P.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Dismissals

Where it does not appear from the pleadings that the party charged by the Mining Enforcement and Safety Administration is a proper party to a penalty proceeding, the action is properly dismissed.

APPEARANCES: Richard V. Backley, Assistant Solicitor, David L. Baskin, Robert A. Cohen, Trial Attorneys for appellant, Mining Enforcement and Safety Administration; Henry Ingram, Esq., for appellee, Ohio Mining Company.

OPINION BY CHIEF ADMINISTATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

I.

Background

On May 9, 1974, the Mining Enforcement and Safety Administration (MESA) filed a Petition for Assessment of Civil Penalty against Ohio Mining Company (Ohio).[1] On May 28, Ohio filed an answer denying liability on the ground that the subject mine (Strip Permit #5571) "was not operated, controlled or supervised" by Ohio, but by one Patrick Cunningham, an independent contractor, under a contract between Ohio and Cunningham. On July 23, 1974, Ohio filed a motion for summary judgment requesting

[1] The petition charged Ohio with a violation of 30 CFR 77.404.

dismissal of MESA's Petition for Assessment of Civil Penalty. With its motion Ohio filed a copy of the contract [2] and an affidavit of Ohio's President, Thurman Downing. In his affidavit, Downing stated that on the date of the alleged violation, October 4, 1971, the subject mine was being operated by Cunningham. In opposition to Ohio's motion, MESA filed an affidavit of Coperry Keith, federal mine inspector. The only material statement in Keith's affidavit is to the effect that on the date of the alleged violation, Ohio controlled and supervised the operations at the subject mine. (Keith did not issue the order of withdrawal upon which MESA based its petition for assessment of penalty.) On October 11, 1974, the Administrative Law Judge (Judge) issued an order joining Cunningham as co-respondent. On November 4, 1974, MESA filed a motion requesting the Judge to dissolve the order of joinder and to rule upon the motion for summary judgment. On November 15, 1974, a prehearing conference was held for the purpose of hearing arguments on the motions filed, MESA alleged no new facts concerning the operations at the mine but insisted that the question whether Cunningham was an independent contractor was a clear issue of fact precluding the granting of summary judgment in Ohio's favor. Ohio restated its position that it was not liable for civil penalties because it was not responsible for the health and safety of personnel at the mine. On November 18, 1974, the Judge issued an order dismissing the appeal without prejudice, due to a defect of parties. In his order the Judge stated that "If the terms of the [contract] have been met by the parties, then clearly Patrick Cunningham is an independent contractor and the operator of the mine in question." The Judge did not specifically rule on the motion for summary judgment.

II.

Contentions of the Parties

MESA contends first that the Judge erred in joining Cunningham since in doing so he engaged in a prosecutorial function. MESA also argues that a hearing should have been held to investigate the contractual relationship between Ohio and Cunningham, and determine who in fact was responsible for the health and safety of the miners at the mine on the date the Order was issued.

Ohio contends that joinder was proper. Ohio contends further that the contract together with its affidavit entitled it to a ruling granting summary judgment but that the proceeding was properly dismissed

[2] The contract contained the following provisions: * * * Third: Contractor shall furnish at his own expense, all men, materials, equipment and machinery necessary for the operation of a strip mine upon said premises, which men, materials, equipment and machinery shall be solely under the control of contractor.

* * * * *

Eighth: Contractor shall be deemed and considered to be an independent contractor and in no way shall be considered the employee or agent of the owner.

since the order of joinder over Cunningham was later dissolved by the Judge.

Discussion

With respect to joinder, we note that if the Judge exceeded his power in attempting to join Cunningham, he corrected this error in dissolving his order. Therefore, the issue whether a judge may join, *sua sponte*, a party in a penalty proceeding is not before the Board in this case. Thus, the only issue before us for decision is whether the Judge erred in dismissing the proceeding due to a defect of parties. We hold that he did not.

[1] The action taken by the Judge is in effect a dismissal for lack of jurisdiction over a necessary party and is, as such, supported by the record. While Ohio presented a contract which indicates on its face that it was not responsible for the health and safety of personnel at the mine, MESA has alleged no facts to the contrary. Its speculative and conclusory pleadings and the affidavit of Mr. Keith do not effectively rebut the showing by Ohio.

It appears from the record that the Judge was prepared to receive any evidence MESA might have to enable him to determine who the operator was and that all MESA offered was the affidavit of Inspector Keith, which had no probative value on this question. On the other hand, the contract placed in evidence by Ohio, supported by the affidavit of its president, warranted the Judge's conclusion that Ohio was not the proper person to be charged.

MESA's choice of party does not, on the present state of the record, withstand the scrutiny of review. We, therefore, conclude that the proceeding was properly dismissed.

ORDER

Wherefore, pursuant to the authority delegated to the Board of Mine Operations Appeals by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision dismissing the appeal IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

ESTATE OF HIEMSTENNIE (MAGGIE) WHIZ ABBOTT

4 IBIA 12
(*See also* 2 IBIA 53, 80 I.D. 617 (1974))

Decided *April 17, 1975*

Appeal from an Order affirming will and decree of distribution.

Affirmed.

1. Indian Probate: Hearing: Full & Complete—255.3

A full and complete hearing is had on proof of a will when all parties are afforded an opportunity to present evidence and to cross-examine witnesses.

2. Indian Probate: State Law: Applicability to Indian Probate, Testate—390.2

Compliance with state laws setting forth requirements for the execution of wills is not required in the execution of Indian wills disposing of trust or restricted property.

3. Indian Probate: Wills: Witnesses, Attesting—425.32

An attesting witness is disqualified from acting in an attesting capacity only if his interest in the will is of a fixed, certain, and vested pecuniary character, or one which otherwise gives him a direct and immediate beneficial right under the will.

4. Indian Probate: Wills: Witnesses, Attesting—425.32—Indian Probate: Wills: Publication—425.21

There is no requirement in the regulations or elsewhere that the attesting witnesses be present at the same time, or sign in the presence of the testatrix, or that the testatrix acknowledge her subscription to the will to the witnesses, or that she "publish" said instrument by declaring it to be her last will.

5. Indian Probate: Witnesses: Observation by Administrative Law Judge—430.4

Where testimony is conflicting, the factual findings of the Administrative Law Judge will not be disturbed because he had the opportunity to observe and hear the witnesses.

6. Indian Probate: Wills: Undue Influence: Failure to Establish, Generally—425.30.1

To invalidate an Indian will because of undue influence, it must be shown: (1) that the decedent was susceptible to being dominated by another; (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) that such person, at the time of the testamentary act, did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

APPEARANCES: James H. Phelps, Esq., for appellant, Doris Imogene Whiz Burkybile; Owen M. Panner, Esq., of Panner, Johnson, Marceau and Karnopp, for appellees.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled case was remanded for rehearing because appellees were not afforded full opportunity to be heard.

The matter was heard by Administrative Law Judge Robert C. Snashall at Warm Springs, Oregon, on May 31, 1974.

Based upon the evidence presented at the hearing, the Judge found, *inter alia*, that the decedent, Hiemstennie (Maggie) Whiz Abbott, died testate on April 4, 1970, leaving surviving as her sole heir at law, a granddaughter, Doris Imogene Whiz Burkybile. He further found that said decedent left a last will and testament dated March 2, 1970, wherein she devised her entire estate to Ramona Whiz Smith, as her sole devisee, with the exception of a one-dollar bequest to Doris Imogene Whiz Burkybile.

The Judge further found that although said will was drafted by a minor child of the devisee and witnessed by only members, or soon-to-

be members, of the immediate family of the devisee, the preponderance of the evidence disclosed that said will was drafted and executed in all respects substantially in accordance with applicable law and was done at a time when the decedent was of sound and disposing mind and in full control of her faculties.

Upon the issuance of the order affirming the will and decree of distribution, Doris Imogene Burkybile petitoned for rehearing. The petition was denied and the petitioner appealed to this Board.

Essentially, the basis for rehearing and appeal are identical. The contentions are as follows:

(1) The hearing should have been held on the Yakima Reservation for the reason that Doris Whiz Burkybile had witnesses located in that area who would testify that undue influence was used on the decedent in obtaining the execution of the will.

(2) That Nora Speedis, Toppenish, Washington, a niece of the decedent, could not appear at the Warm Springs hearing on May 31, 1974, because of the distance between Warm Springs and Toppenish.

(3) The evidence fails to show that the will was made and executed in the manner required by law.

(4) The will should not have been admitted as evidence, because the witnesses gave conflicting evidence as to the manner of execution.

(5) The evidence is insufficient to support the findings and the Order of August 5, 1974, and on the contrary, shows that the purported will was obtained by undue influence and therefore is null and void.

(6) The decision is arbitrary and capricious and not supported by the evidence.

We cannot agree with the appellant's first and second contentions.

[1] A full and complete hearing is had on proof of a will when all parties are afforded an opportunity to present evidence and to cross-examine witnesses. *Estate of Charlotte Davis Kanine*, IA–828 (Jan. 8, 1959). [Same case as IA–828 (Supp.), 72 I.D. 58 (1965).]

The record clearly shows that all parties, appellant and appellees alike, were ably represented at the hearing by counsel.

At no time preliminary to the taking of testimony did the appellant or her attorney offer the slightest objection to the hearing being held at Warm Springs. Moreover, appellant and her attorney were afforded still another opportunity to ask for continuance to Yakima or Toppenish, for whatever the reason, when counsel for appellees in his closing argument, referring to the admissibility of the affidavit of Marie Kanim George, stated at page 330 of the transcript:

* * * If there's any question concerning the admissibility of this affidavit of Marie Kanim George as I indicated I would ask for a continuation of this to have the testimony of Marie Kanim George and if counsel for the protestants wishes it I'm still willing to recess this until we can go to reset this hearing for Yakima, take the testimony of Marie Kanim George, if there's any question about it. I want the record to show that offer. * * *

No response was made by the appellant or her attorney to this offer. Instead, they chose to remain silent. The appellant cannot now say that

the hearing should have been held at Yakima. She cannot now argue that Nora Speedis could not appear because of the distance between Warm Springs and Toppenish. Moreover, pursuant to the rules promulgated by the Department, ample opportunity was afforded appellant to take the deposition of any witness who was unable to appear at Warm Springs. See 43 CFR 4.232 (b).

Because the decedent lived continuously at Warm Springs during the last six or seven years of her life, except for one short interruption, it is reasonable to conclude the hearing would be held at a place convenient to those persons who were familiar with the decedent then, and also at the time of the making of the will.

Turning to contentions three and four, it appears that these contentions were based upon requirements usually found in state laws.

[2] It is well established that compliance with the requirements of state laws in the execution of Indian wills is not required. *Blanset* v. *Cardin*, 256 U.S. 319 (1921); *Estate of Annie Devereaux Howard*, IA–884 (Dec. 17, 1959):

> Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust * * * shall have the right prior to the expiration of the trust or restrictive period * * * to dispose of such property by will, in accordance with regulations prescribed by the Secretary of the Interior * * * 25 U.S.C. § 373 (1964).

The pertinent regulation simply provides that an Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses. See 43 CFR 4.260(a).

[3] An attesting witness is disqualified from acting in an attesting capacity only if his interest in the will is of a fixed, certain, and vested pecuniary character or one which otherwise gives him a direct and immediate beneficial right under the will. *Estate of Matilda Levi*, A–24653 (Nov. 3, 1947).

In the case at bar, the decedent affixed her thumbprint and the will was attested by three witnesss. There appears to be a conflict as to whether the attesting witnesses were present at the same time; whether they signed in the presence of the testatrix, or that the testatrix acknowledged her subscription to the will to the attesting witnesses; or that she "publish" said instrument by declaring it to be her last will.

[4] There is no requirement in the regulations or elsewhere that the attesting witnesses be present at the same time, or sign in the presence of the testatrix, or that the testatrix acknowledge her subscription to the will to the witnesses, or that she "publish" said instrument by declaring it to be her last will. *Estate of William Cecil Robedeaux*, 1 IBIA 106, 78 I.D. 234 (1971).

It is a rule of general application that, in the absence of a statute re-

quiring it, publication is unnecessary. 94 C.J.S. Wills § 187 (1956).

[5] Where testimony is conflicting, the factual findings of the Administrative Law Judge will not be disturbed because he had the opportunity to observe and hear the witnesses. *Estate of Ammon Pubigee*, IA–859 (Apr. 7, 1966).

We conclude from a review of the entire record that the execution of the will was proper in all respects and completely in accordance with applicable regulations.

The appellant further contends that the evidence is insufficient to support the findings and the Order of August 5, 1974, and on the contrary shows that the purported will was obtained by undue influence.

[6] To invalidate a will because of undue influence upon a testatrix, it must be shown: (1) that she was susceptible of being dominated by another; (2) that the person allegedly influencing her in the execution of the will was capable of controlling her mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce her to make a will contrary to the decedent's own desires. *Estate of Louis B. Fronkier*, IA–T–24 (Feb. 24, 1970). If any one of these elements of proof is missing, an allegation of undue influence cannot be established merely by showing that an opportunity existed for it to be exerted. *Estate of Joe (Joseph) Sherwood*, IA–P–10 (May 9, 1968).

The evidence adduced at the hearing establishes the decedent had previously been an excessive drinker. However, when she freely moved to Warm Springs to live with Ramona Whiz Smith, the evidence shows that she drank on occasions but only in moderation. The evidence clearly establishes that the decedent was active, fully cognizant of the world around her, of what she was doing, that she had a mind of her own, and that she had the objects of her bounty in mind. There is no evidence in the record showing any indication of undue influence.

Appellant's contention that the evidence is insufficient to support the findings and the Order of August 5, 1974, and that the will was the result of undue influence is clearly not substantiated by the evidence.

Suffice it to say that the sixth contention, namely, that the decision is arbitrary and capricious and not supported by the evidence, is without foundation or merit.

Consequently, the Board finds that the appellant has failed to come forth with any evidence to support the aforementioned contentions. Accordingly, the Order of August 5, 1974, should be affirmed and the appeal dismissed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order of the Administrative Law Judge issued August 5, 1974, in the estate herein be, and the same is HEREBY AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

ALEXANDER H. WILSON,
Administrative Judge.

RICHARD W. ROWE, DANIEL GAUDIANE

20 IBLA 59

Decided *April 24, 1975*

Appeal from decision of the Alaska State Office, Bureau of Land Management, rejecting oil and gas lease offer F-694.

Affirmed.

1. Alaska: Land Grants and Selections: Generally—Notice: Constructive Notice

Published notice of a proposed State selection in accordance with regulatory requirements is adequate notice to all persons claiming the lands adversely to the State.

2. Alaska: Land Grants and Selections: Validity—Alaska: Statehood Act—Notice: Generally—Patents of Public Lands: Generally

Section 6(b) of the Alaska Statehood Act does not require that patents issued to the State include a proviso that the conveyed lands are vacant, unappropriated, and unreserved, and do not affect any valid existing claim, location or entry under the laws of the United States. The Department assures compliance with this provision by excluding from selection all lands noted on its records as being appropriated and reserved, or subject to valid existing interests, and by requiring that adequate notice be given to all other persons claiming an interest in the selected land. The Department can then receive objections to the issuance of a patent and can render a determination as to the availability of the selected lands.

3. Alaska: Land Grants and Selections: Mineral Lands—Alaska: Land Grants and Selections: Validity—Alaska: Statehood Act—Patents of Public Lands: Reservations

Section 6(i) of the Alaska Statehood Act provides that grants of mineral lands to the State are made upon the condition that all subsequent State conveyances of the mineral lands shall be subject to and contain a reservation to the State of all the minerals in the lands so conveyed. The Act does not require that federal patents to the State include a proviso to the above effect, rather, it is subsequent State conveyances which must contain a reservation for minerals.

4. Alaska: Land Grants and Selections: Generally—Alaska: Oil and Gas Leases—Alaska: Statehood Act—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Discretion to Lease

Section 6(b) of the Alaska Statehood Act providing for recognition of valid existing claims does not apply to an oil and gas lease offer filed pursuant to the Mineral Leasing Act of 1920. While an oil and gas lease offeror may have a right to a lease where the Department has exercised its discretion to issue a lease, and the offeror is entitled to a statutory priority right over other offerors, his ap-

plication does not rise to the level of a "claim" or "right" within the savings clause of the Alaska Statehood Act where there has been no such determination to lease.

5. Alaska: Land Grants and Selections: Applications—Applications and Entries: Priority—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Discretion to Lease—Oil and Gas Leases: First Qualified Applicant—Oil and Gas Leases: Preference Right Leases—Regulations: Applicability

Regulation 43 CFR 2627.3(b) (2) requires that conflicting oil and gas lease offers filed pursuant to the Mineral Leasing Act of 1920, except for preference-right applications, whether filed prior to, simultaneously with, or after the filing of an Alaska State selection, must be rejected when and if the selection is tentatively approved. The preference right referred to in the regulation does not apply to an oil and gas lease offeror who receives a priority right as the first qualified applicant in the event the Department decides to issue a lease.

6. Alaska: Land Grants and Selections: Generally—Oil and Gas Leases: Patented or Entered Lands—Patents of Public Lands: Effect

The Department of the Interior has neither jurisdiction over nor authority to issue oil and gas leases for lands patented to the State of Alaska.

APPEARANCES: Max Barash, Esq., Washington, D.C., for appellants; James N. Reeves, Esq., Office of the Attorney General, for the State of Alaska; Karen A. Shaffer, Esq., Office of the Solicitor, Department of the Interior, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

INTERIOR BOARD OF LAND APPEALS

Richard W. Rowe and Daniel Gaudiane have appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 15, 1974, rejecting their joint noncompetitive oil and gas lease offer, F–694, for lands in Block 4, T. 4 N., R. 16 E., U.P.M., Alaska, on the grounds that the United States no longer has jurisdiction over the lands, nor authority to issue leases thereon, as the lands in the subject offer, including the mineral rights, were patented to the State of Alaska on March 27, 1974.

On January 11, 1968, appellants filed their joint oil and gas lease offer in the Fairbanks Land Office. On January 18, 1968, the Land Office notified appellants that their application was in conflict with a Native protest and that further action would be suspended pending final disposition of Native claims by Congress. On December 9, 1968, pursuant to section 6(b) of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. notes prec. § 21 (1970), the State of Alaska filed selection application F–10324 encompassing the subject land. The State selection was similarly affected by the Native protest.

On January 17, 1969, the Secretary of the Interior issued Public Land Order (P.L.O.) 4582 which

withdrew all public lands in Alaska from all forms of appropriation and disposition under the public land laws) except locations for metalliferous minerals), including leasing under the Mineral Leasing Act of 1920, *as amended*, 30 U.S.C. § 181 *et seq.* (1970), and selection by the State of Alaska pursuant to the Alaska Statehood Act. *See* 34 FR 1025 (Jan. 23, 1969). P.L.O. 4582 was subsequently modified a number of times until it was revoked pursuant to section 17(d)(1) of the Alaska Native Claims Settlement Act of Dec. 18, 1971, 85 Stat. 688, 708, 43 U.S.C. § 1616(d)(1) (Supp. III, 1973); however, the lands were again withdrawn from mineral leasing by P.L.O. 5186, 37 FR 5589 (March 16, 1972). P.L.O. 5186 permitted the resumption of land selections by the State of Alaska under the Alaska Statehood Act.

Following release of the lands for State selection, the Alaska State Office directed the State of Alaska to publish notice of its application as required by 43 CFR 2627.4(c), in order to allow all persons claiming an adverse interest in the land to file in the appropriate land office their objections to the issuance of a patent. Following publication, the Director, BLM, issued a decision on Mar. 27, 1974, tentatively approving the State's selection. On the same day, a final certificate was issued to the State for Patent No. 50-74-0097.

In its decision dated May 15, 1974, the State Office informed appellants that:

> Under a continuing policy established by the Secretary of the Interior, all [oil and gas lease] offers filed prior to PLO 4582 would be maintained of record until such time as the lands were either 1) once again made available for mineral leasing or 2) patented and no longer under the jurisdiction of the Federal government. (See *Vance W. Phillips, Aelisa A. Burnham*, 14 IBLA 79 (Dec. 11, 1973).)

Accordingly, as the subject land was patented to the State and no longer under the jurisdiction of the United States, appellants' offer was rejected.

The appellants have presented numerous contentions in support of their appeal. Their five main points are: 1) it was improper for the State Office to issue a patent to the State without having first given appellants actual notice and an opportunity to object to the issuance of the patent; 2) the issuance of the patent to the State without the inclusion of certain provisions for the protection of vested rights and State mineral interests violated the requirements of the Alaska Statehood Act and rendered the patent void or voidable; 3) the filing of appellants' oil and gas lease offer segregated the land from all other forms of appropriation and created priority rights for appellants superior to all other adverse claims, including a subsequent selection by the State; 4) the BLM file for the State selection fails to disclose approval by the President or his designated representative as required by section 6(b) of the Statehood Act for lands selected north and west of the National Defense Withdrawal Line

established by section 10(b) of the Statehood Act; and 5) the State of Alaska became the sucessor-in-interest to the United States' interest in the subject land with the obligation to issue a noncompetitive oil and gas lease to appellants on their pending priority offer. Appellants request that, under the circumstances, the Board recommend cancellation of the "unrestricted" patent and direct the BLM to issue a lease to appellants; or in the alternative, that the Board direct the BLM to refer appellants' lease offer to the appropriate office of the State of Alaska for further consideration based upon their priority offer.

[1] In their initial argument, appellants contend that it was improper for the Department to issue a patent to the State without having first given appellants *actual* notice and an opportunity to object to the issuance of the patent. In accordance with 43 CFR 2627.4(c), the State of Alaska published notice of its proposed selection for five consecutive weeks in order to bring to the knowledge and attention of all persons who were interested in the lands described therein the fact that the State proposed to establish and perfect its claim to the selected lands. The State's publication specifically stated that, "One purpose of this notice is to allow all persons claiming the lands adversely to file in this [BLM] office their objections to issuance of patent to the State." Publication in accordance with regulatory requirements is adequate notice. *Duncan Miller*, 20 IBLA 1 (1975); *Chemi-Cote Perlite Corp.* v. *Bowen*, 72 I.D. 403 (1965); *see also* 66 C.J.S. *Notice* §§ 13, 18 (1955), and cases cited therein. Accordingly, we find that, as a result of the publication, appellants received adequate notice and an opportunity to object to the issuance of the patent to the State of Alaska.

In their next argument, appellants contend that it was improper for the Department to issue a patent to the State which failed to describe the lands selected as vacant, unappropriated, and unreserved, and as not affecting any valid existing claim, location, or entry under the laws of the United States. Appellants also object to the fact that the patent did not include a proviso prohibiting the State from subsequently reconveying the mineral interests it acquired.

[2] Section 6(b) of the Statehood Act provides that the State may select up to 102,550,000 acres from the public lands in Alaska which are vacant, unappropriated and unreserved at the time of their selection, provided the selection does not affect any valid existing claim, location or entry under the laws of the United States. The Act does not require that patents to the State include a proviso to that effect. Compliance with this provision is fulfilled by the Department excluding from selection all lands noted on its records as being appropriated and reserved, or subject to valid existing interests, and by requiring that

adequate notice be given to all other persons claiming an interest in the land. The Department can then receive objections to the issuance of a patent and can render a determination as to the availability of the selected lands. In the present case, following publication of the State's proposed selection, the BLM, in its decision tentatively approving the State's application, made a finding that, "The lands described * * * are not known to be occupied or appropriated under the public land laws, including the mining laws * * *." We conclude that this procedure adequately assured conformity with the requirements of the Statehood Act.

[3] We also reject appellants' argument that it was improper to issue a patent to the State without including a proviso prohibiting the State from reconveying acquired mineral interests. Section 6(i) of the Statehood Act provides that grants of mineral lands to the State are made upon the condition that all subsequent State conveyances of the mineral lands shall be subject to and contain a reservation to the State of all of the minerals in the lands so conveyed. All lands or minerals disposed of contrary to the provision are to be forfeited to the United States by appropriate proceedings instituted by the United States Attorney General. Again we note that the Act does not require that federal patents to the State include a proviso to the above effect. Rather, it is subsequent State conveyances which must contain a reservation for minerals. Adherence to this requirement of the Act is adequately assured by the fact that the laws of the United States are the supreme law of the land, and state action in contravention can be set aside. *Lee* v. *Florida*, 392 U.S. 378, 385–86 (1968).

Appellants next contend that the filing of their oil and gas lease offer segregated the land from all other forms of appropriation and created priority rights for them superior to the subsequent selection by the State. Appellants urge that the language within section 6(b) of the Statehood Act which protects "any valid existing claim, location, or entry under the laws of the United States," applies to oil and gas lease offers filed pursuant to the Mineral Leasing Act of 1920. Appellants argue that once their oil and gas lease offer was filed, the lands described therein were no longer "vacant, unappropriated and unreserved" lands available for State selection in accordance with section 6(b) of the Statehood Act. Appellants additionally urge that their oil and gas lease offer is encompassed by the exception provided for in section 6(g) of the Statehood Act, which provides in part that:

> * * * [T]he State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation. Such preferred right shall have precedence * * * but not over other preference rights now conferred by law. * * *

[4] In *Schraier* v. *Hickel*, 419 F. 2d 663 (D.C. Cir. 1969), *aff'g Charles Schraier*, A–30814 (Nov. 21, 1967), the Court considered the arguments raised by appellants in this case. The Court concluded that the language in section 6(b) of the Alaska Statehood Act providing for recognition of valid existing claims did not apply to an oil and gas lease offer filed pursuant to the Mineral Leasing Act. The Court stated the following at 666–67:

> This language in § 6(b) is inapplicable to an application for an oil and gas lease under the Mineral Leasing Act of 1920. That Act provides that lands subject to disposition under the Act, which are believed to contain oil or gas deposits, "may be leased by the Secretary of the Interior." The Act directed that if a lease was issued, it had to go to the first qualified applicant, but "it left the Secretary discretion to refuse to issue any lease at all on a given tract." Udall v. Tallman, 380 U.S. 1, 4, 85 S. Ct. 792; 13 L. Ed. 2d 616 (1965). [Footnote omitted.] The fact that the Bureau published a notice that it would receive offers to lease did not preclude a later exercise of discretion to decline to lease. An application for lease, even though first in time or drawn by lot from among simultaneous offers, is a hope, or perhaps expectation, rather than a claim.
>
> * * * * *
>
> An applicant under the Mineral Leasing Act may have the further right to a lease where he is entitled to a lease over anyone else under the law and the Secretary has exercised his discretion to execute a lease. [Footnote omitted.] But his proposal does not rise to the level of "claim" or "right" within the saving clause of the Statehood Act where there has been no such determination to lease.

The Court also concluded at 667–68 that an oil and gas lease offer did not fall within the "existing valid rights" or "equitable claims" exception provided in section 6(g) of the Statehood Act. The Court interpreted the exception as applying to those persons who would lose permits already granted, who owned valuable improvements on the land, or where there was some other form of physical possession or improvement made pursuant to law.

Appellants urge that the holding in *Schraier* is inapposite to the present case. Appellants argue that the Court failed to consider the long line of decisions of the Department of the Interior which allegedly hold that an application for an oil and gas permit or lease segregates the land from adverse appropriation and that an applicant has a priority right over any adverse interest thereafter sought to be initiated. Appellants also argue that P.L.O. 4582, which allegedly protected and preserved appellants' oil and gas lease offer for the duration of the freeze, was not considered in *Schraier*, nor did the Court consider 43 CFR 2627.3(b)(2), which allegedly provides for the rejection of a State selection to the extent that the lands are included within a prior oil and gas lease application. Finally, appellants urge that the Court did not consider the State of Alaska's regulation § 517.21(a) of Subchapter 1, Chapter 5, Division of Lands, of the State Department of Natural Resources, which ex-

pressly recognizes and confirms the rights of pending priority federal lease offerors to the issuance of noncompetitive oil and gas leases in the absence of classification of the land as competitive.

Again we are unpersuaded by appellants' arguments. The numerous Departmental cases relied upon by appellants do not support their proposition that an application for an oil and gas lease segregates the land from all other conflicting appropriations. The cases cited by appellants have to do with *issued* oil and gas leases and permits which were considered to be interests in public land under the laws of the United States, which appropriated the land to private use, and precluded subsequent acquisition until the interest was officially canceled and removed. *See, e.g., Luta T. Pressey*, 60 I.D. 101, 102 (1947), and cases cited therein.[1]

Next appellants urge that the Court in *Schraier* failed to consider the "vested right" granted to an oil and gas lease offeror under P.L.O. 4582. Section 2 of the order provided in part that all oil and gas lease offers then pending before the Department would be given the same status and consideration, upon enactment of the Alaska Native Claims Settlement Act, as though there had been no intervening period. Section 3 of the order provided that the State of Alaska would, subject to the provisions of section 2, have preferred rights of selection pursuant to the Alaska Statehood Act.

[5] Contrary to appellants' assertion, P.L.O. 4582 did not vest appellants with a right to a lease upon the expiration of the withdrawal. The order simply assured them that their lease offer would be given the same priority "status and consideration" if the Department, in its discretion, decided to issue any lease at all. *Vance W. Phillips, supra, modified, Vance W. Phillips*, 19 IBLA 211 (1975); *George E. Utermohle, Jr.*, 3 IBLA 94 (1971). The Department, however, has exercised its discretion in this area by determining that an oil and gas lease offer will be rejected to the extent of a conflict with a tentatively approved Alaska State selection application, even though the lease offer was filed before the selection application. *Union Oil Co. of California*, A–29907 (Feb. 20, 1964). This policy is reflected in 43 CFR 2627.3(b)(2), which appellants erroneously interpret as providing for the rejection of a State selection to the extent that the lands are included within a prior oil and gas lease offer. The cited regulation provides in part:

[1] Appellants place considerable reliance upon *Solicitor's Opinion*, 55 I.D. 205, 211 (1935), wherein the Solicitor discussed what constituted an "existing valid right" protected in a savings provision of a temporary withdrawal. Contrary to appellants' assertion, the Solicitor did not include mineral lease applications within this category. Rather, he simply noted that the particular withdrawal did not specifically preclude discretionary issuance of such leases: "In order that this opinion may be more comprehensive, it is deemed pertinent to add, although the precise question was not submitted, that permits and leases *may be granted* under the Mineral Leasing Act * * * for the withdrawn lands * * *." (Italics added.)

*** * * Conflicting applications and offers for mineral leases and permits, except for preference right applicants, filed pursuant to the Mineral Leasing Act, whether filed prior to, simultaneously with, or after the filing of a selection under this part will be rejected when and if the selection is tentatively approved by the authorized officer of the Bureau of Land Management * * *.**

In accordance with this regulation (and its predecessor 43 CFR 76.12 (b)) the Department has consistently held that an oil and gas lease offer must be rejected when approval is given to a subsequently filed State selection. *Duncan Miller, supra; Haruyuki Yamane*, 19 IBLA 320 (1975); *Yolana Rockar*, 19 IBLA 204 (1975); *Lloyd W. Levi*, 19 IBLA 201 (1975); *Standard Oil Co. of California*, 71 I.D. 1, 2 n. 2 (1964); *Union Oil Co. of California, supra; Violet Goresen*, A–29268 (Apr. 24, 1963); *J. L. McCarrey, Jr.*, A–28436 (Nov. 14, 1960); *cf. Mountaineering Club of Alaska*, 19 IBLA 198 (1975); *Cripple Creek Coal Co.*, 70 I.D. 451 (1963). Accordingly, we reject appellants' argument that the regulation requires rejection of a State selection to the extent that the lands are included within a prior oil and gas lease offer.

Appellants argue in the alternative that while they may not have a vested right to a noncompetitive lease, they do come under the "preference right" exception in 43 CFR 2627.3(b)(2), as they contend that the Mineral Leasing Act confers upon them a "statutory preference right" to a noncompetitive lease. Again we reject appellants' argument as having no merit. The preference rights referred to in the regulation do not include oil and gas lease offers. In *William J. Howe*, A–26205 (August 28, 1951), the Department described the legal distinction between an existing oil and gas lessee who had a "preference right" to a new lease, as opposed to an oil and gas lease offeror who simply gained a "statutory priority right" as the first qualified applicant in the event the Department decided to issue a lease. Appellants' application falls within the latter category.[2] This distinction is further buttressed in *Schraier* v. *Hickel*, *supra* at 667–68, where the Court refused to consider petitioner's oil and gas lease offer as coming within the exception in section 6(g) of the Statehood Act for "preference rights now conferred by law."[3] Accordingly, we conclude that no rights of appellants were in any way violated by issuance of the patent to the State of Alaska.

Appellants next urge that the BLM file for the State's selection fails to disclose approval by the President or his designated representative as required by section 6(b) of the Statehood Act. In the final proviso of section 6(b), there is the

[2] A specific "preference right" exception for oil and gas lease *offers*, which does not apply in this case, can be found in section 6 of the Act of July 3, 1958, 72 Stat. 322. *See McGreghar Land Co.*, 67 I.D. 81 (1960); *Zena L. Cochran*, A–28297 (June 8, 1960); *Pexco, Inc.*, 66 I.D. 152 (1959).

[3] For examples of preference rights conferred by law, see, *e.g.*, 30 U.S.C. §§ 223, 229, 262, 272, 282 (1970); *see also* 43 CFR 3520.1–1.

requirement that no selection shall be made in the area north and west of the National Defense Withdrawal Line established by section 10(b) of the Act, without approval of the President or his designated representative. The State's selection in this case is included within that area.

Under the terms of Executive Order No. 10950, 26 FR 5787 (June 27, 1961), the Secretary of the Interior was designated to exercise the authority vested in the President to approve selections of land in this area, provided the Secretary of Defense, or his designee, concurred in the proposals. The final paragraph of the Executive Order reads as follows:

> As the Secretary of the Interior may direct, the Under Secretary of the Interior, an Assistant Secretary of the Interior, the Director of the Bureau of Land Management, or the Operations Supervisors of the Bureau of Land Management in Alaska are severally authorized to exercise the authority vested in the Secretary by this order.

By order published in 26 FR 7303 (Aug. 11, 1961), the Secretary of the Interior delegated his authority to the Under Secretary and Assistant Secretaries, severally.

On January 10, 1969, the State Office transmitted copies of the State's selection application to the designee of the Secretary of Defense and to the Director, BLM. By letter dated Aug. 15, 1971, the Defense Department approved State selection of the land. The BLM file, however, does not contain evidence of approval by the Secretary of the Interior or by any of his delegates under the order dated Aug. 11, 1961. Tentative and final approvals were given by the Director, BLM.[4]

Appellants have requested that the Department recommend that action be taken to cancel the patent. We note first that there is a presumption that all necessary steps re-

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[4] The Board has been unable to find any delegation which grants the Director, BLM, the authority to approve selections in the subject area. We do not believe that such authority is included within the Director's general delegation powers. *See Departmental Manual* § 235.1.1. The Director's general delegation is limited by § 235.1.2(2) which states that the Director is not delegated any authority regarding, "any action to be taken with the approval or concurrence of the President, or the head of any department or independent agency of the Government."

We also note that section 200.1.4 of the *Departmental Manual* states the following: "*Authority of the Secretary to Delegate.* The Secretary of the Interior has broad power to delegate his authority. However, nothing in this Delegation Series empowers any officer or employee of the Department to exercise authority which the Secretary by the terms of the legislation, Executive Order or other source of authority may not delegate. Thus, authority given to the President by law and delegated to the Secretary by Executive Order cannot be redelegated except as provided in the Executive Order. *If the Executive Order confines redelegation to specified officers * * * these specific positions and authorities must be referred to in the redelegation.* * * *" (Italics added.)

Also, we take administrative notice of a memorandum to the State Director, Alaska, from the Acting Chief, Division of Lands and Recreation, BLM, dated September 13, 1961, which states in part the following: "[B]y order published in the *Federal Register* on Aug. 11, 1961 (26 F.R. 7303), the Secretary delegated his authority to the Under Secretary and the Assistant Secretaries severally. * * * At present, authority to approve selections north of the 'PYX Line' [National Defense Withdrawal Line] has *not* been delegated to the Director, Bureau of Land Management. Until such time as a delegation is made, we must obtain the approval of the Office of the Secretary along with the concurrence of the Department of Defense. * * *" (Italics in original.)

quired by law had been taken before patent issued to the State. *Maxwell Land-Grant Case*, 121 U.S. 325, 381–82 (1887). However, assuming *arguendo*, that a mistake in authorization does exist in the present case, the issue before the Board is whether the Department should recommend to the Attorney General that suit be brought to cancel the patent. *Moore* v. *Robbins*, 96 U.S. 530 (1877); *Bryan N. Johnson*, 15 IBLA 19, 21 (1974); *Charles Kik*, A–27872 (Dec. 1, 1959). The Department will not ordinarily recommend that the Attorney General initiate suit to cancel a patent unless: (1) the Government has an interest in the remedy by reason of its interest in the land; (2) the interest of some party to whom the Government is under obligation has suffered by issuance of the patent; (3) the duty of the Government to the people so requires; or (4) significant equitable considerations are involved. *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273 (1887); *Bryan N. Johnson, supra; Dorothy H. Marsh*, 9 IBLA 113, 115 (1973). As the Government is under no obligation to appellants, we do not believe this case falls within category (2), nor are any of the other categories pertinent to appellants. Accordingly, we find no basis for recommending that suit be initiated to cancel the patent. However, we do recommend that the BLM make certain that proper approval was made pursuant to section 6(b) of the Alaska Statehood Act. If a mistake did occur, the Department may, in alternative to recommending cancellation of the patent, either properly ratify the prior authorization, issue a new patent, or take other action which is appropriate under the circumstances.[5]

[6] Finally, we turn to appellants' remaining argument, namely, that under regulations promulgated by the State of Alaska, the State is required to issue a noncompetitive oil and gas lease to appellants based upon their priority offer filed pursuant to the Mineral Leasing Act of 1920. As correctly noted in the State Office decision, after the subject lands were patented to the State, the Department lost jurisdiction over the lands. *Russ Journigan*, 16 IBLA

[5] We note that if an error did occur, it appears to be a minor one in nature. The approval requirement in section 6(b) of the Statehood Act is for the benefit of the Department of Defense. That Department considered the merits of the selection and concurred in its approval. As stated in a letter to Maurice H. Stans, Director, Bureau of the Budget, from Acting Secretary of the Interior, Elmer F. Bennett, dated November 16, 1960: "The establishment of this national defense area, of course, is designed to give the military departments a freer hand in planning the defenses of Alaska and of the entire United States * * *. * * * If in point of fact the land desired for selection by the State is militarily unimportant, the State should be allowed to select it everything being equal. The strategic value of the land is best determinable by the military department concerned. It is believed, therefore, that the question whether in any case a State selection should be allowed for lands within the segregated area should be addressed by the Department of the Interior, which administers the land, to the Department of Defense. If the determination is not adverse to selection, approval can be secured without further referral." Assuming the Department concludes that the mistake (if it exists) does not merit Departmental correction, the State of Alaska may decide to take action in order to remove any cloud which may exist on its title to the lands. *See McGarrahan* v. *Mining Co.*, 96 U.S. 316 (1877).

79, 80 (1974); *Bryan N. Johnson, supra; R. E. Puckett*, 14 IBLA 128, 130 (1973); *Pexco, Inc.*, 66 I.D. 152, 154 (1959). If appellants wish to continue their efforts to acquire an oil and gas lease on the subject lands, they must pursue their request with the State of Alaska in accordance with the laws of that State.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is affirmed.

MARTIN RITVO,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

EDWARD W. STUEBING,
Administrative Judge.

ADMINISTRATIVE APPEAL OF MARY ANN TOPSSEH COMBS

v.

COMMISSIONER OF INDIAN AFFAIRS

4 IBIA 27

Decided *April 28, 1975*

Appeal from an administrative decision of the Commissioner of Indian Affairs, affirming the decision of the Acting Area Director, Billings Office.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act—Administrative Procedure: Administrative Review—Administrative Procedure: Initial Decision—Administrative Procedure: Substantial Evidence

The ultimate findings and decision of the administrative law judge adopted by the Commissioner of Indian Affairs will not be set aside upon administrative review where they are supported by substantial evidence.

APPEARANCES: Gary Niles Kimble, Esq., for appellant, Mary Ann Topsseh (Combs); Edward L. Meredith, Esq., for Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

This matter comes before the Board on an appeal from the decision of the Commissioner of Indian Affairs adopting the findings and recommendations of Administrative Law Judge Frances C. Elge, after an adversary hearing held on December 12, 1973, at the Flathead Agency, Ronan, Montana, and affirming the decision of the Acting Area Director, Billings Area Office.

The appeal is brought on the grounds the decision of the Commissioner is contrary to the facts and evidence as presented at the administrative hearing. Appellant contends that her moneys were disbursed contrary to her intent constituting a breach of the fiduciary relation which existed between the

appellant and the then Superintendent, Harold D. Roberson.

These contentions in essence are similar to those raised at the hearing afforded the appellant and again in a memorandum preliminary to the issuance of the Commissioner's decision.

Having reviewed the record, including 127 pages of transcript of testimony taken at a hearing where all interested parties were represented by learned counsel, and briefs of appellant and appellees, the Board finds that the appellant has shown no reason why the findings of fact, conclusions of law, and recommended decision of Administrative Law Judge Elge adopted by the Commissioner of Indian Affairs should not be affirmed.

[1] We hold that there is substantial evidence in the record to support the findings and recommended decision of the Administrative Law Judge adopted by the Commissioner of Indian Affairs. We adopt Judge Elge's decision attached hereto.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 211 DM 13.7 and 43 CFR 4.1(2), the appeal is hereby dismissed and the decision of the Commissioner of Indian Affairs is AFFIRMED.

MITCHELL J. SABAGH,
Administrative Judge.

WE CONCUR:

DAVID J. MCKEE
Chief Administrative Judge.

ALEXANDER H. WILSON,
Administrative Judge.

July 9, 1974

ADMINISTRATIVE LAW JUDGE C/O BUREAU OF INDIAN AFFAIRS BILLINGS, MONTANA 59101

ADMINISTRATIVE APPEAL (FOR REFUND) OF MARY ANN TOPSSEH (COMBS), FLATHEAD ALLOTTEE 1648, FROM A DECISION OF THE BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS.

FINDINGS AND RECOMMENDED DECISION.

1. By order of August 21, 1973, issued by the then Acting Chief Administrative Law Judge William Fauver, Office of Hearings and Appeals, Arlington, Virginia, the undersigned was designated to conduct a hearing in the appeal in caption, to provide a transcript thereof to become a part of the record together with documentary evidence admitted or tendered at the hearing, and to issue findings of fact and a recommended decision to be transmitted to the Assistant Secretary for Indian Affairs. By modification of July 1, 1974, the undersigned was directed to transmit the record with the findings and recommended decision to the Commissioner of Indian Affairs.

2. A hearing was duly held at the Flathead Indian Agency at Ronan, Montana, on December 12, 1973. Mary Ann Topsseh (Combs), hereinafter referred to as the appellant, was represented by Gary Niles Kimble, Esq., of Missoula, Montana. The Billings Area Office and the Flathead Indian Agency, Bureau of Indian Affairs, were represented by Edward L. Meredith, Esq., of the Billings Field Solicitor's Office.

3. The appellant, a Salish Indian, is a member of the Confederated Salish and Kootenai Tribes of the Flathead Indian Reservation and, at the time of the transaction involved in this case, was ninety years old. She does not read nor write.

FACTS

4. In November 1972, the appellant received a check from the Bureau of Indian Affairs for $16,823.85, proceeds from the sale of her own 80-acre allotment 1684 to the Confederated Salish and Kootenai Tribes. On November 28, 1972, the appellant, with the check in her possession, traveled from her home near Arlee, Montana, to the Flathead Indian Agency at Ronan, Montana, with Mrs. Cecelia Vanderberg, a neighbor. With Mrs. Vanderberg present, she discussed with Flathead Agency personnel, including the Superintendent, Mr. Harold D. Roberson, the matter of disposition of the check. At the conclusion of the discussions, the check was deposited to the credit of the appellant's individual Indian account which is administered by the Bureau of Indian Affairs.

5. After preparation, execution by the appellant, and approval by the Superintendent of appropriate applications therefor, the amount of the check was distributed to ten of the appellant's grandchildren and one great grandchild, an eleventh thereof each. The appellant retained a twelfth of such amount. A check for that share, $1,401.98, was mailed to the appellant. Each of the recipients owned an undivided fractional interest in Flathead allotment 1647, that of Louie Topsseh (Combs), the late husband of the appellant and progenitor of the recipients. (Exhibit 3.)

6. On December 22, 1972, the appellant, her son Abel Combs Topsseh, and her attorney Mr. Kimble visited the Superintendent at the Flathead Indian Agency, informing the Superintendent that the appellant had not intended to give the money to the recipients; that she had intended to buy their shares in the Louie Topsseh (Combs) allotment 1647 with such payments. On December 26, 1972, the Superintendent wrote to the appellant's counsel describing the transaction and, among other things, stating: "We are convinced it was Mrs. Combs' intent on November 28 to make an outright gift to the persons indicated."

7. By letter of April 4, 1973, the appellant's counsel filed an appeal with the Area Director, Billings Area Office, Bureau of Indian Affairs. By letter of May 3, 1973, the Area Director affirmed the action of the Flathead Indian Agency Superintendent. This appeal of that decision was taken by letter of May 17, 1973, to the Commissioner of Indian Affairs.

8. The sole issue in this appeal is whether, on November 28, 1972, the appellant intended (1) gifts of money to the recipients or (2) the payment of such money in consideration for the purchase of the recipients' interests in the Louie Topsseh (Combs) allotment.

DISCUSSION OF EVIDENCE

9. On November 28, 1972, the appellant went to the home of Cecelia Vanderberg, her neighbor. She had with her the check for $16,823.85. She asked Mrs. Vanderberg to write a letter for her to the Superintendent to give the money to "these children that hadn't received anything when their grandfather Louie died." Mrs. Vanderberg stated that the appellant was referring to her grandchildren. Tr. 66, 67. Mrs. Vanderberg then told the appellant that she and her husband were going to the Agency and that, if the appellant desired, she could "come with us and we'll just go in and see about it." Mr. and Mrs. Vanderberg and the appellant then proceeded to the Flathead Indian Agency in the Vanderberg automobile. (Tr. 66.) Mrs. Vanderberg further testified that the appellant said nothing about wanting to buy land; that all the appellant said to her was to give this to the children; that when they got to the Agency office they talked to Eileen Decker and Frenchy Burland (both realty specialists at the Flathead Agency); that Frenchy called in Superintendent Roberson and talked

to him; that she recalled that the Superintendent advised the appellant that she could handle the matter herself but that the appellant wanted it done through the Agency; that the appellant did not want Bob Matt (surviving husband of appellant's deceased granddaughter Teresa Delphine Matt) to get any of it for the reason that, when Bob Matt's wife Teresa was killed (mother of Ramona Plant, one of the recipients of the money involved), allegedly Bob Matt did not give his daughter Ramona any of the insurance recovery; that said alleged deprivation was appellant's reason for giving Ramona a share. (Tr. 68.)

10. Mrs. Vanderberg, also a member of the Flathead Tribes, has been a neighbor of the appellant for 36 years. She speaks only the English language. She stated that the appellant lived right across the road, about a quarter of a mile from the Vanderberg home (Tr. 65); that appellant would come to her home when she wanted a letter written; that Mrs. Vanderberg or her daughters would write letters for the appellant; and that through the years she had always understood the appellant; and that the appellant understood her and her family. (Tr. 69, 75, 76.)

11. Mrs. Vanderberg did not remember the Superintendent's asking the appellant about whether the appellant wanted to buy land.

12. When Mrs. Vanderberg and the appellant came to the Agency office on November 28, 1972, they proceeded to the small office of Francis O. (Frenchy) Burland and Mrs. Eileen Decker. Both Mr. Burland and Mrs. Decker are members of the Flathead Tribes; neither understands or speaks the Indian language.

13. Mr. Burland testified that Mrs. Vanderberg spoke first, stating that the appellant wished to distribute money, represented by the check in the appellant's possession, to her grandchildren; that he advised Mrs. Vanderberg that he thought the appellant was going to buy property; that Mrs. Vanderberg and the appellant talked briefly, Mrs. Vanderberg asking the appellant if she was going to buy "this property" and that the appellant responded, "I'm too old. I don't need the land; I don't need the money." (Tr. 80, 85, 87); that Mr. Burland, not knowing whether the money could be distributed by the Agency, requested Mr. Roberson to join the group to listen to what the appellant had to say; that Mr. Roberson asked her "you mean you don't want to buy the land?" and that she responded that she did not, that she wanted to give the money to her grandchildren, whereupon Mr. Roberson advised her that she could take the check to the bank and that they would do it for her; that the appellant rejected the suggestion stating that she wanted the Superintendent to do it, adding, "That's what you're here for." Mr. Burland felt no need to get an interpreter because the appellant was speaking perfectly clear English and appeared to understand exactly what he was saying to her. (Tr. 80, 81.)

14. Mr. Roberson's testimony, with respect to his participation in the transaction, was corroborative of that given by Mr. Burland. (Tr. 43, 44.) Additionally, Mr. Roberson recounted that the appellant wanted the Agency to handle the matter for her so that there would be a record of what she had done and that the appellant stated, "I want them to have this for their share and leave me alone." He testified that both Mr. Burland and he specifically asked the appellant if she wished to purchase the interests these heirs held in the Louie Topsseh (Combs) allotment, to which she replied in the negative, stating that she did not need any more land because she was too old; that he asked her more than once, "Are you sure you do not want to buy the land?" and that each time he received a negative reply either from the appellant or from Mrs. Vanderberg. (Tr. 44.) Mr.

Roberson then complimented the appellant on her generosity and, with Mrs. Decker and the appellant, discussed distribution of the money and the identity of the recipients, appellant's grandchildren and one great grandchild. Mr. Roberson recalled that the appellant added Ramona Plant, a great grandchild, to the list of recipients because "her parents never did anything for her." (Tr. 53.)

15. After the discussion, the appellant was asked to come back after lunch to give Mrs. Decker time to prepare documents necessary for effecting the transaction.

16. Mrs. Decker's testimony was almost identical to that given by Mr. Roberson and Mr. Burland with respect to participants in the discussion of the transaction, questions asked, and replies given by the appellant, as recounted in paragraphs 13 and 14, *supra*. (*See* Tr. 92, 93.) Added was that, after the discussions, Mrs. Decker prepared documents for payments of money to twelve recipients, one great granddaughter and eleven grandchildren, including Margaret Topsseh Pablo, appellant's granddaughter, the daughter of Abel Combs Topsseh. When Mrs. Decker was reviewing the documents with the appellant, Mrs. Decker read the name and amount for each recipient. When she read one for Margaret, the appellant said, "No. Margaret's dad is living. Abel is living." She did not want Margaret included. Rather than having eleven new forms prepared in a larger amount to each, the appellant elected to keep $1,401.98, one share, for herself. (Tr. 46, 94.)

17. When the appellant received her check for one-twelfth of the land sale money, she asked her son Abel Combs Topsseh to take her to Missoula, Montana, to "take this check in, to go to the bank." Mr. Topsseh looked at the check and asked the appellant, "Where's the big check?" He testified that the appellant answered that she had bought the land back, that she had given the check to the Superintendent. Mr. Topsseh further stated that the appellant needs help in making deals, such as buying a car. He observed that "* * * sure she needs help but she thinks she can do it, you know." He testified that she can't talk English too good. (Tr. 10.)

18. Mr. Topsseh related that, after he learned of disposition of the big check, he and the appellant went to the Agency to see Mr. Roberson about the transaction; that the appellant jumped up and told him (Mr. Roberson), "If I want to give that money away like that why I'd send 'em, you know, myself." In response to questioning by Mr. Kimble, concerning the meeting with the Superintendent, his further testimony was:

Q. Did she use part English and part Indian?

A. Yes. She uses, you know, she's

Q. Did you have to interpret?

A. No. I didn't say nothing. Just let her and Roberson fight it out. So that's when that happened, why I said, "Now you keep quiet. We're going to go see a lawyer." I try to tell her how to straighten this up.

19. Concerning purchasing of interests in the Louie Topsseh (Combs) allotment 1647, it is established that, at the time of executing a deed in favor of the Confederated Salish and Kootenai Tribes for her own 80-acre allotment, within a month prior to her receiving her check therefor, the appellant expressed to Mr. Burland that when she received the money "she wanted to, in turn, then purchase interests in the land, in what I [Mr. Burland] assumed the land that she was living on." (Tr. 79.) It is also established that Mr. Topsseh had advised the Superintendent that he and his mother were going to buy the land back with the proceeds from the sale of her land. Tr. 8, 51. Both Mr. Topsseh and Mr. Roberson testified that, when Mr. Topsseh informed Mr. Roberson of the intention to purchase the land, Mr. Roberson told Mr. Topsseh that it will be her money and that she can do what she wants with it. (Tr. 7, 51.)

20. In preparation for the purchase of the interests in allotment 1647, Mr. Tops-

seh, in early October 1972, obtained from Mr. Burland two applications to sell interests to the appellant, one for Ignace Adams and one for Robert Eugene Adams, so that they or one of them could start the sale. Each owned a 17/630 undivided interest in the Louie Topsseh Combs allotment. *See* Exhibit 3, continuation sheets 3, 4. No evidence was submitted as to what thereafter transpired with respect to those applications. Mr. Burland was not thereafter contacted about them. (Tr. 83, 20.)

21. Appellant's testimony, both in English and through an interpreter, except for her remembering that she received her land sale check and that she made the November 28 trip to the Agency, was frequently unresponsive. With respect to the November 28, 1972, transaction at the Agency, she testified that upon arrival at the Agency, "There were three standing there, two ladies and that agent;" that she told him, "I come to see you about my land," that "I come to tell you I want to do for my land and why I got the money. There are two, you know, these two ladies; they look at each other and they seem to understand." She stated that she told the Superintendent, "* * * I wanted to come and for my land, I wanted to give my grandchildren share for their share from Louie;" that "she buys them people their share." (Tr. 32.) She further stated that Mrs. Vandenberg said nothing during the discussions; that she just stood by the door, when, in fact, Mrs. Vandenberg had sat beside the appellant to assist her, albeit all in the English language. (Tr. 33, 92.)

22. The testimony of Mr. Abel Topsseh was that the appellent, his mother, lived in a log house on the Louie Topsseh (Combs) allotment 1647; that, with the money received from the land sale, she wanted to buy the grandchildren out so she would have it for herself; that after she received her check for one-twelfth of her land sale money, she told him that she had bought the land with the "big check." Mr. Topsseh was not present during the November 28 transaction. Moreover, it is apparent even from his testimony, as well as that of others, that the appellant is an independent person and likes to run her own affairs; and that he opposed deals she made, such as leasing land for considerations he deemed inadequate. (Tr. 125, 126.)

23. In support of the contention that the appellant should not transact business without the assistance of an interpreter, appellant's counsel took the testimony of Father Edmund G. Robinson, a priest at St. Ignatius Mission. Father Robinson stated his relationship with the appellant to be that of a client to a priest and of a friend to a friend; that he was in contact with the appellant for two years ending with the summer of 1964, when he was transferred to another location; and that he was in contact with her again from the summer of 1968 to date. Father Robinson contrasted her ability to understand and speak English in the earlier period with that ability during the later period of his contacts with her. It was his observation that her hearing in the later years was considerably impaired; that the appellant has a general understanding about the commonalities of life; that her expression in English can be understood by someone who has known her but is fragmented and broken in various ways; that he and the appellant had had misunderstandings about simple things on occasion when he had talked with her; that a reasonable man would have to be extremely prudent in dealing with a matter of such magnitude (the transaction here involved); that he asked her twice to explain the transaction and that she advised him that she could not explain it in English but could if he understood Indian. He doubted her ability to formulate a transaction of that size. (Tr. 21, 22.) His main conversations with the appellant had been about everyday things. His testimony is given little weight in

that his relationship was not of a business nature as were the appellant's dealings with Agency personnel.

24. In addition to the participants in the transaction, Donna Rae Fuqua, lease clerk at the Flathead Agency, testified with respect to the appellant's negotiating a lease on 20 acres of hay land in March 1972, and of her and her lessee's being in the Agency during the instant hearing to prepare and execute a modification of the lease, execution of such modification having been prevented by Mr. Abel Combs who thought the consideration inadequate. (Tr. 110, 123.) Mrs. Fuqua confirmed that the appellant could converse in English and convey her wishes as to what she wanted.

25. The Supervisory Social Services Representative at the Flathead Agency also testified that the appellant understood English, could readily be understood, and had the ability to handle her own affairs.

26. A factor in this matter is that from the time of the death of Louie Topsseh Combs, Allottee 1647, the appellant had lived on his allotment; she and her son Abel had used the land, belonging to them and the other heirs, for farming and raising cattle; they made no payments for such use to the other heirs, except $17 paid to Delphine Matt. The recipients of the money from the appellant's land sale were among those heirs. (Tr. 52, 104.) It may have been the nonpayment for such use that prompted the appellant's distribution of funds to her favored descendants.

27. After the appellant and her son Abel had employed counsel, after the two with their counsel had called on the Superintendent on December 22, 1972, and after the Superintendent's letter of December 26, 1972, namely on or about February 1, 1973, according to the testimony of Superintendent Roberson, the appellant walked into his office and told him, "I want you to know that I'm not angry with you for what you've done. You did what I wanted." At the same meeting, in English, she stated that she wanted the Superintendent to know that (distribution of the money) was not a gift to her heirs but that she wanted them to have that as a share of whatever she had had or derived from the land.

28. The Louie Topsseh Combs Allotment 1647 is owned by 22 persons in varying, undivided fractional shares. The appellant owns one-third plus her dower right; appellant's son Abel Topsseh owns one-sixth; appellant's daughter Mary Topsseh Felsman, one-sixth. Shares of these three, collectively, account for ownership of two-thirds or 66⅔% of the allotment. Collectively, the shares of the recipients of the money here involved represent ownership of 1938/7560 or approximately 25⅔% thereof. The remaining shares, vested in eight owners constitute 582/7560 or approximately 7⅔% of the ownership. Exhibit 3, continuation sheets 3, 4. Had appellant's intent been to purchase, it would seem that all extant shareholders would have been included, particularly an owner such as Robert Matt whom the appellant obviously dislikes. (Tr. 52, 68, 98.)

29. From Abel Topsseh's testimony about the proposed purchase, it appears that his interest was greater than that of an agent for the appellant. First, he quoted the appellant as having told him, on the day she received the land sale check, "I'm going to buy this 80 back from the grandchildren." When referring to his getting forms from Frenchy Burland, and having been asked if he saw anyone else in the office, he stated, "Well there was somebody else besides him, I don't know. Eileen knows that I was talking because he gave me the form and I told him that *I* was buying this land back * * *." (Tr. 6, 7.) When asked about talking with Mr. Robenson, Mr. Topsseh stated, "* * * I told him that *we* was buying this land back, you know." (Tr. 8.) [Italics supplied.] Apparently Mr. Topsseh planned to share in the benefits of the appellant's acquisition of land.

FINDINGS

30. Considering the record as a whole, I find that a preponderance of reliable, probative, and substantial evidence establishes that:

(1) The appellant was not and is not under disability, legal or otherwise;

(2) The appellant, to and including the date of the hearing in this matter, has been conducting business affairs at the Flathead Agency, with respect to which most communication has been in the English language; occasionally, the appellant requests the assistance of an interpreter;

(3) Cecelia Vanderberg, appellant's neighbor, who has communicated with the appellant frequently over the past 35 years, understood the appellant and the appellant understood Cecelia during all periods of conversation on November 28, 1972;

(4) Mr. Burland, Superintendent Roberson, and Mrs. Decker exercised great care to, and did, ascertain the appellant's intent with respect to distribution of the proceeds of appellant's land sale check in the amount of $16,823.35.

CONCLUSION

At all times on November 28, 1972, it was the intent of the appellant to divide the proceeds of her land sale check, supra, among ten of her grandchildren and one great grandchild without receiving land interests in exchange therefor.

RECOMMENDATION

It is recommended that the May 3, 1973, decision of the Acting Director, Billings Area Office, Bureau of Indian Affairs (letter of May 3, 1973, to Mr. Gary Niles Kimble), be affirmed.

FRANCES C. ELGE,
Administrative Law Judge.

ADMINISTRATIVE APPEAL OF PAUL N. JACKSON
v.
AREA DIRECTOR, ANADARKO, ET AL.

4 IBIA 39

Decided *April 29, 1975*

Appeal from an administrative decision canceling lease, demanding possession of premises and demanding proceeds of 51 acres of wheat harvested therefrom.

Reversed and remanded.

1. Indian Lands: Leases and Permits: Violation: Damages

The measure of damages is governed primarily by applicable provisions of the lease to the extent specified and provided therein.

APPEARANCES: Virgil L. Upchurch, Attorney for Paul N. Jackson, appellant; Ryland L. Rivas of the law firm of Pipestem, Rivas and Charloe, for Salome V. Nestell, et al., appellees.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

Paul N. Jackson, hereinafter referred to as appellant, through his attorney, Virgil L. Upchurch, has appealed the September 5, 1974 decision of the Acting Area Director, Anadarko Area Office, affirming the

decision of August 5, 1974, of William W. Grissom, Superintendent, Anadarko Agency, Anadarko, Oklahoma.

The Superintendent in his said decision of August 5, 1974, canceled the appellant's lease, demanded possession of the premises, and demanded the proceeds of 51 acres of wheat harvested (wheat crop in trespass).

According to the record, the appellant on February 5, 1969, entered into Lease Contract No. 25257, hereinafter referred to as lease, with the owners of Kiowa Trust Allotment No. 240, described as NE¼, sec. 24, T. 7 N., R. 13 W., Indian Meridian, Caddo County, Oklahoma, for a term of five years beginning January 1, 1970, and ending December 31, 1974. The subject lease was approved by the Superintendent on February 24, 1969.

The lease in question makes no provision for any of the acreage to be cultivated. The appellant, according to the record, plowed and planted 51 acres of the premises to wheat in the fall of 1973. By letter of July 24, 1974, the Superintendent advised the appellant of the violation and gave him ten days from the date thereof in which to show cause why the lease should not be canceled. In response thereto, the appellant, on July 30, 1974, attempted to justify his actions and offered to pay an additional $425 rental for cropping the 51 acres.

The Superintendent on August 5, 1974, advised the appellant that his justification for plowing and planting the 51 acres as set forth in his letter of July 30, 1974, was unacceptable. The Superintendent further advised the appellant as follows:

(1) Your lease, above identified, is hereby cancelled, and

(2) Demand is hereby made for the proceeds of 51 acres of wheat harvested (wheat crop in trespass), and

(3) Demand is hereby made for the possession of the premises.

In appealing the Superintendent's decision of August 5, 1974, to the Area Director of the Anadarko Area Office the appellant in support of his appeal set forth the following reasons:

(1) That there was a denial of due process of law to Mr. Jackson by failing to afford Mr. Jackson a hearing before the Superintendent after he had shown cause in his letter of July 30, 1974.

(2) That there is an error of law by the Superintendent in stating that a wheat crop was in trespass as Mr. Jackson was properly in possession under the lease which error violates Mr. Jackson's legal rights.

(3) That there is an error of law in stating the amount of damages if a crop was harvested in violation of the lease which error violates Mr. Jackson's legal rights.

The Area Director, on September 5, 1974, affirmed the decision of the Superintendent in the following language:

(1) It is contended there was a denial of due process of law to the lessee, Mr. Jackson, by not having a hearing before the Superintendent after the delivery of the response letter by Mr. Jackson of July 30, 1974. The 10-day period afforded

the individual from the date of the 10-day notice is the period in which the lessee may come forward with his showings of why the lease should continue. The regulations do not contemplate a hearing after the lessee has filed objections in the form of a letter, all arguments whether oral or written are to be presented in the allotted 10-day period.

(2) It is contended that the Superintendent was in error in stating the wheat crop was in trespass since Mr. Jackson was in possession under the lease. We feel the Superintendent was correct in his decision that it was a wheat crop in trespass because it violated the express provisions of the lease requiring the establishment of lovegrass in the 35-acre tract and certainly the maintenance of the balance of the pasture land in its native grass state as it existed at the beginning of the lease. The trespass complained of is a trespass of the terms of the lease, not a trespass of the land. By plowing up the required lovegrass and an additional amount of existing pasture Mr. Jackson committed a trespass of the lease provisions to plant the 35 acres of lovegrass and to maintain the other pasture land.

(3) The amount of damages to satisfy the lease violation was stated in the August 5, 1974 cancellation letter, namely the full proceeds of 51 acres of wheat harvested.

The Area Director in his decision of September 5, 1974, further stated:

After having reviewed your reasons for challenging the decision of the Anadarko Agency Superintendent to cancel the subject farming and grazing lease, we affirm the Superintendent's finding that the lease is cancelled, demand is made for possession of the leased premises, and payment of the gross proceeds of 51 acres of harvested wheat is requested to be paid to the Bureau of Indian Affairs for the benefit of the Indian owners.

It is from the foregoing decision that the appellant has appealed to this forum. The three reasons set forth in support of the appeal are not repeated herein since they are substantially the same as those set forth in appellant's appeal to the Area Director as hereinabove set forth.

The appellant in his brief filed with this Board under date of January 3, 1975, sets forth the fact that actual possession of the premises in question has been delivered to the succeeding lessee, therefore rendering moot the cancellation issue. Accordingly, only the issue regarding the amount of damages demanded by the Superintendent, as affirmed by the Area Director, remains for the consideration of this Board

It is the contention of the appellant that the proper measure of damages in this case is a fair and reasonable rental for the use of the land in question. In support of his contention the appellant cites Section 62, Title 23 of the Oklahoma Statutes; *Kelly* v. *Weir*, 243 F. Supp. 588 (D.C. Ark. 1965); *Schradsky* v. *Stimson*, 76 F. 730 (8th Cir. 1896) and *Long-Bell Lumber Company* v. *Martin*, 66 P. 328, 11 Oklahoma 192 (1901).

We are not in complete agreement with the appellant's contention regarding damages or the authorities cited in support thereof. In the first instance, state law would be inapplicable for measuring the damages since trust or restricted lands are involved. Federal laws in cases in-

volving trust or restricted lands have been held paramount to state law. *Sperry Oil and Gas Company* v. *Chisholm*, 264 U.S. 488, 44 S. Ct. 372 (1924). Act of Congress supplants the laws of Oklahoma in relation to Indians. *Blanset* v. *Cardin*, 256 U.S. 319 (1921).

In the second instance, the cases cited by appellant in support of his contention involved trespass on fee or nontrust lands whereas this appeal involves a landlord-tenant relationship on trust or restricted Indian lands.

The Superintendent, on the other hand, takes the position that the measure of damages is the entire proceeds from the 51 acres of wheat which was planted in violation of the lease contract. No authority, however, is cited by the Superintendent in support of his position. Apparently, it is based on the equitable doctrine that "one should not profit from his wrong." Appellees' counsel contends generally that appellant's actions resulted in damage to the land and to allow him to profit therefrom would lead to his unjust enrichment as well as leaving the appellees with the damaged land to restore. Counsel, however, fails to state what the measure of damages should be for appellant's wrongful action.

[1] It appears rather strange that the parties in their respective contentions set forth above completely fail to take into consideration the provisions of the lease, particularly Section VIII. SOIL CONSERVATION REQUIREMENTS. Clearly, the measure of damages in this appeal is to be governed primarily by applicable provisions of the lease to the extent specified and provided therein.

Subsection C, Section VIII of Additional Lease Requirements incorporated into and made a part of Lease Contract No. 25257 provides:

> *Native grass is not to be plowed up at any time* and alfalfa shall not be plowed up in the last year of the lease without written permission from the approving officer. (Damages, $25.00 per acre) (Italics supplied.)

In light of the fact that the lease herein allows for no cultivation it is quite evident and clear that the appellant's action in plowing up the 51 acres was in direct violation of subsection C, *supra*, and subject to the penalties specified therein.

In addition to the penalty or damages specified, under subsection C, *supra*, the appellees are entitled to have the 51 acres restored to its condition immediately prior to the violation, *i.e.*, restoring it to pasture or a cash payment in lieu thereof.

Considering the foregoing, the Board finds that the damages for the apparent willful and deliberate plowing of the 51 acres in violation of the lease subsection C, *supra*, are $1,275. The Board further finds that the 51 acres in question shall be restored by appellant to its original condition prior to the violation or in lieu thereof make payment of an equivalent cash value as determined by the Superintendent under Section VIII of the Additional Lease Requirements. Accordingly,

the decision of the Superintendent as affirmed by the Area Director should be overruled and remanded to the Superintendent for implementation of the Board's findings set forth above.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, and 211 DM 13.7 issued December 14, 1973, the decision of August 5, 1974, of the Superintendent, Anadarko Agency, as affirmed by the Area Director on September 5, 1974, is hereby OVERRULED and in lieu thereof it is HEREBY ORDERED as follows, to-wit:

(1) that the appellant make payment of $1,275 for the violation of subsection C, Section VIII of Additional Lease Requirements, and

(2) that the appellant restore to its original condition the 51 acres plowed in violation of the lease or in lieu thereof, if agreeable to appellees, to pay them an equivalent cash value, the value to be determined by the Superintendent of the Anadarko Agency under Section VIII of the ADDITIONAL LEASE REQUIREMENTS.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

KENTLAND-ELKHORN COAL CORPORATION
EASTERN COAL CORPORATION

4 IBMA 130

Decided *April 30, 1975*

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Michael A. Lasher (Docket Nos. M 73-68 and M 73-69), dated October 22, 1974, granting a Petition for Modification of the Application of 30 CFR 75.1403-10(j) for the period of three years until October 22, 1977, to permit a shuttle car operator to drive his car facing, but not necessarily seated, in the direction of travel.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally

A Petition for Modification of the Application of a Mandatory Safety Standard will not be granted where petitioner alleges but does not establish that in all respects and at all times the modification sought will be as safe as, or safer than, the mandatory safety standard.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, Madison McCulloch, Esq., and Frederick Moncrief, Esq., Trial Attorneys, for appellant, Mining Enforcement and Safety Administration; Raymond E. Davis, Esq., for appellees, Kentland-Elkhorn Coal Corporation and Eastern Coal Corporation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On June 25, 1973, Kentland-Elkhorn Coal Corporation and Eastern Coal Corporation (collectively referred to hereinafter as Kentland-Elkhorn) filed Petitions for the Modification of the Application of the Mandatory Safety Standard set forth in 30 CFR 75.-1403–10(j) pursuant to section 301 (c) of the Act.[1] 30 CFR 75.1403–10(j) provides that: "Operators of self-propelled equipment should face in the direction of travel." The Mining Enforcement and Safety Administration (MESA) interprets, and the Judge so held, this regulation to require such an operator to sit facing the direction of travel. Kentland-Elkhorn requested that this safety standard be modified to permit some of its shuttle car operators to sit facing in the opposite direction of travel but to turn their heads to face the direction of travel instead of changing seats, a method of operating a shuttle car used by some car operators. (The cars travel in both directions.)

Kentland-Elkhorn's Petitions were published in the *Federal Register* in Volume 38, No. 139, on Friday, July 20, 1973. No comments were received as a result of such publication. However, after completing the investigation required by section 301(c), two MESA safety inspectors reported on September 27, 1973, that of the shuttle car operators they had talked with, most stated that they believed the regulation requirement to be the safer method, but that some car operators felt that the proposed method was safer since they had not been trained and were not accustomed to driving in the method prescribed by the regulation. This report concluded that the alternate (proposed) method was not as safe as the method required by 30 CFR 75.1403–10(j). As a result of this report, MESA opposed the granting of the Petitions.

At a hearing held on January 28, 1974, in Pikeville, Kentucky, testimony was heard from three witnesses for Kentland-Elkhorn and the investigating inspectors as to the various advantages and disadvantages of the proposed and required methods of operation. In his decision the Judge found that: 1) while the required method provides better forward visibility and the alternate method provides better vision to the rear, both methods provide an equal opportunity for enjoying a 180° plane of vision; 2) the alternate method would provide comparatively better visibility, especially for negotiating sharp turns and observing headers and timbers indicative of a weak roof; 3) the alternate method presents a lesser possibility of dislodgement of timbers; 4) the required method

[1] 30 U.S.C. §§ 801–960 (1970). (§ 861(c).)

allows better observation of the shuttle cars' controls; 5) the required method requiring the operator to change seats rather than turning around may be more fatiguing; and 6) although few in number, there is evidence that the required method was involved in two accidents, one a fatality, but that truly meaningful injury and accident records were not kept with respect to each method. From this, the Judge concluded that the alternate "turned around" method will at all times guarantee no less than the same measure of protection afforded the miners in the mines involved as that provided by the required method.

Based on the foregoing, the Judge granted Kentland-Elkhorn's Petitions for a period of three years to permit individual operators to use whichever system they prefer, so that some statistical evidence of the safety of each method can be obtained and be presented if Kentland-Elkhorn sought an extension of their Petitions.

In its brief on appeal, MESA contends that the Judge erroneously concluded that Kentland-Elkhorn had established by a preponderance of the evidence that the alternate method guaranteed no less than the same measure of protection as that provided by the required method in that such conclusion is not supported by the evidence. Petitioners contend that there is adequate evidence to support the Judge's finding and conclusion.

Issue Presented

Whether the Judge's conclusion that the proposed "turned around" method of operation is as safe as the method required by 30 CFR 75.1403–10(j) is supported by the evidence.

Discussion

Section 301(c) of the Act requires that the Secretary determine that the alternative method proposed will at all times guarantee no less than the same measure of protection afforded the miners as that provided by the standard sought to be modified, or that the application of such standard will result in a diminution of safety to the miners. This Board is of the opinion that the Judge erred in concluding that the petitioners had met this requirement of the statute. Our review of the record indicates that the greater weight of the evidence is on the side of MESA. We are not impressed by the fact that the Judge granted the Petition for three years with the thought that additional statistics on safety might be accumulated during that time. We are concerned with the safety of the miners now and in the immediate future. It appears from the record that an adequate training program for car operators to drive facing the direction of travel would be a better solution than granting a Petition for Modification which would permit the individual preferences of the car operators to prevail against the intention of the regulation to bring

about uniformity of a safe driving method.

In the instant case, the Judge found that in the areas of forward visibility, and visibility of the controls, the required method is superior to the alternative method proposed by Kentland-Elkhorn. Our review indicates that the Judge's finding of fact with respect to these two areas is supported by the evidence. Although the Judge also found that in some other respects the alternative method was as safe as or safer than the required method, we do not believe this is enough to satisfy the statute. Section 301(c) was not intended to provide a balancing of safe and unsafe factors where the overall safety of the miners is involved. Since we find that the alternative method in all respects and at all times has not been shown to be as safe as, or safer than, the required method, the Judge's conclusion must be reversed and Kentland-Elkhorn's Petitions must be denied.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above captioned case IS REVERSED and the Petitions for Modification ARE DENIED.

C. E. Rogers, Jr.,
Chief Administrative Judge.

I CONCUR:

David Doane,
Administrative Judge.

O

APPEAL OF HENSEL PHELPS CONSTRUCTION COMPANY

IBCA-1010-11-73

Decided *May 8, 1975*

Contract No. 14-06-D-6788, Specifications No. DC-6728, Auburn-Foresthill Bridge Substructure, Bureau of Reclamation.

Sustained in Part.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Burden of Proof

Where a contract for the construction of a bridge substructure contained a provision requring that employees erecting bridges and structures be protected by safety nets where the use of safety belts and lifelines or other conventional type of protection was impractical and the evidence failed to demonstrate that the use of safety belts and lifelines or other conventional type of protection was practical for workers on concrete piers, the Board denies the contractor's claim for a change based on the fact that it was required to use safety nets to protect workmen from possible falls.

2. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Modification of Contracts: Generally—Contracts: Performance or Default: Release and Settlement

Where the practice of a construction contractor was to separate claims for an equitable adjustment for increased costs due to a change from its claims for delays to the work caused by the change and the evidence established that the contractor's delay claim resulting from a change was pending before the contracting officer at the time the contractor agreed to and executed a modification settling the equitable adjustment for direct costs attributable to the change, the Government's contention that the delay claim was barred by accord and satisfaction was rejected since it is well settled that an agreement does not operate as an accord as to matters not contemplated by the agreement.

3. Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Formation and Validity: Generally—Contracts: Performance or Default: Compensable Delays

In a case where the Government (i) rejected certain conditions attached to the contractor's offer to perform at the contract unit price additional excavation due to a directed change, (ii) determined that the contractor was entitled to an extension of 82 days as the time required to perform the additional excavation which was accepted by the contractor, (iii) recognized that the contractor might be entitled to an additional extension due to certain operation being extended into the inclement winter weather and (iv) subsequently granted the contractor a 20-day time extension due to unusually severe weather, the Board finds the contractor to be entitled to an equitable adjustment for increased costs of working in winter weather which were the direct and inevitable consequence of the directed change, rejecting Government contentions that the contractor's claim was barred by accord and satisfaction or that it represented costs for working in inclement weather for which the contract made no provision.

4. Contracts: Construction and Operation: Actions of Parties—Contracts: Construction and Operation: Modification of Contracts: Generally—Contracts: Performance or Default: Release and Settlement

Where the contractor's offer to perform certain changed work for a lump sum was accepted and the agreement and the price was incorporated into a modification which the contractor executed without reservation or exception and the lump sum was subsequently paid, the contractor's subsequent claim for delays to the work attributable to the change was barred by accord and satisfaction.

APPEARANCES: Mr. Robert A. Ruyle, Vice President, Hensel Phelps Construction Co., Greeley, Colorado, for the appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE NISSEN

INTERIOR BOARD OF CONTRACT APPEALS

This appeal involves five claims for additional compensation totaling $125,052.02. In accordance with the stipulation of the parties only the issue of entitlement is before us.

Findings of Fact

The contract, awarded to Hensel Phelps Construction Co. on May 5, 1969, is in the estimated amount of $2,971,860 and called for the construction of the substructure of the Auburn-Foresthill Bridge. Principal items of work included excavation for Abutments 1 and 2, Piers 1 and 4, and for Piers 2 and 3 above elevation 750, excavation for Piers 2 and 3 below elevation 750 and placing concrete in Abutments 1 and 2, Piers 1 and 4 and placing concrete in the subbases, bases and shafts of Piers 2 and 3. Paragraph 15 of the specifications divided the work into two parts: Part One consisting of construction of abutments including placing backfill and compacting backfill about abutments and Part Two consisting of the remainder of the work.

The contract included Standard Form 23–A (June 1964 Edition) with amendments incorporating the 1967 revisions to, among others, the Changes clause. Timeliness of completion is not in issue.

Safety Nets

Paragraph 8 of the Special Conditions entitled "Safety and Health" provided, *inter alia*, that the contractor would comply with the Bureau of Reclamation publication "Construction Safety Standards" and amendments or revisions thereto in effect at the time of bid opening. The pertinent issue of Construction Safety Standards is dated June 1, 1968 (Exh. 2) and provides in pertinent part:

7.6 Safety Belts and Lines

7.6.1 *Requirement.* Employees working from unguarded heights, on steep slopes, or otherwise subjected to possible falls from heights not protected by fixed scaffolding, guardrails, or safety nets shall be secured by safety belts and lifelines.

7.6.2 *Lifelines.* Lifelines shall be secured to at least two substantial anchorages or structural members.

* * * * *

7.7 Safety Nets

7.7.1 *Requirement.* Safety nets shall be installed to protect employees erecting bridges and structures where the use of safety belts and lifelines or other conventional type of protection is impractical. When directed by the contracting officer's authorized representative, nets shall be used to protect workmen and the public exposed to hazards from overhead construction.

Piers 2 and 3 were approximately 400 feet in height (Tr. 27; Drawings Sheet No. 2). Mr. Merrill Bird, Project Manager for Hensel Phelps, described the operation in constructing the piers. Concrete was poured in ten-foot increments or lifts before it was necessary to raise the forms for the next lift (Tr. 27). The capacity of the crane was such that it was necessary to lift the forms for the sides of the piers in two sections (Tr. 28, 34, 35). Vertical steel reinforcing or rebar was added in 30-foot sections (Tr. 31). The vertical rebar was held in proper position at the top by a heavy, angular steel section referred to as a template (Tr. 22, 26 & 27; photo, Exh. 84). The template was raised with each ten-foot lift so that the vertical reinforcing was in what Mr. Bird referred to as a "three-bar stagger" with one-third of one 30-foot section and two-thirds of another section embedded in the concrete below as the work progressed (Tr. 27, 31).

The main work platform or scaffolding, which was enclosed by three railings, was just below the level of the exposed reinforcing (Tr. 23; Exh. 84). Approximately eight to ten feet below the main work platform was another platform and about 12 to 15 feet below that was a third platform. Mr. Bird testified that the outside of the scaffolds was protected by a wire mesh (Tr. 24). He asserted that handrails were higher and the scaffolds wider than required by the safety code (Tr. 29). Workmen placing rebar and fastening the template referred to above were approximately 25 feet above the deck of the main or uppermost work platform (Tr. 26; photos, Exhs. 83 & 84). Installation of steel reinforcing was actually accomplished by a subcontractor, Great Basin Steel Company.

Although he did not participate in the preparation of Hensel Phelps cost estimate for this project, Mr. Bird testified that he had since reviewed the estimate and that no provision was made for the cost of utilizing safety nets (Tr. 20). He asserted that the contractor's original plan was to use "slip forming" as opposed to conventional forming where the concrete is poured and the forms are moved after each pour (Tr. 21). Slip forming, as described by Mr. Bird, involved a short form constructed upon the foundation which, operated by an internal jacking system, moved vertically up the pier. Contemporaneous documents confirm that Hensel Phelps initially contemplated use of forms

of the slip type.[1] Mr. Bird stated that he had been involved in two slip forming operations and was aware of others and that he knew of no slip forming operation that utilized safety nets. The validity of this testimony is cast in doubt by a memorandum dated January 25, 1972 (App's. Exh. BB), summarizing the discussion at a conference held in Denver on January 18, 1972, to discuss Hensel Phelps' claims wherein Mr. Bird is quoted as stating that the use of safety nets in conjunction with slip forming would have been practical. For reasons apparently related to economy, Hensel Phelps, at a date subsequent to award but not precisely determinable from the record, modified its construction plan and utilized the conventional forming method of constructing the piers (Tr. 23; App's. Exh. BB).

At the preconstruction conference held on May 16, 1969 (Exh. 89), Hensel Phelps' representatives were advised that safety nets in accordance with Chapter 7.2 of the Safety Standards would be required and a discussion ensued concerning the use of the nets. Although Hensel Phelps' representatives made no objection at the time, the Safety Program submitted for the Bureau's approval under date of July 14, 1969 (Exh. 18) did not provide for the use of safety nets. Hensel Phelps was informed that among changes required for Bureau approval of the program was a provision for the use of safety nets (letter from the project engineer dated August 6, 1969, Exh. 20). The revised program, which included provision for safety nets, was approved by the Bureau on December 9, 1969 (Exhs. 27 & 28).

Hensel Phelps issued a purchase order to Pacific Form Corporation for metal forms including safety net supports on November 19, 1969 (Exhs. 67 & 93). Preliminary form drawings were submitted to the Bureau under date of December 15, 1969 (Exh. 29) and the Bureau commented thereon, recommending changes to net supports and bracing (letter, dated January 8, 1970, Exh. 31). Nets were discussed at safety meetings in March, April and May 1970 (Exhs. 87, 88 and 90). Form drawings were again submitted to the Bureau on May 19, 1970 (Exh. 47) and net supports approved as appearing generally to conform to industry standards (letter, dated June 1, 1970, Exh. 48). Nevertheless, at the safety meeting on June 18, 1970, a discussion ensued as to whether the purpose of the nets was to protect personnel from possible falls or to protect workmen and the public below from falling objects (Exh. 91). When it was explained that all walkways would be enclosed with wire mesh and the bases of the piers blocked off so that no personnel would be permitted to enter, the Bureau's safety engineer expressed his agreement and indicated that under such circumstances it was not necessary to line the nets with wire mesh.

[1] Memorandum summarizing discussion at preconstruction conference, dated May 23, 1969 (Exh. 89); Hensel Phelps' letter, dated June 18, 1969 (App's. Exh. A).

In a letter, dated July 2, 1970 (Exh. 49), Hensel Phelps referred to an oral directive issued on June 26, 1970, that safety nets be installed, expressed the opinion that the walkways and mesh as presently constructed comply with the requirements of the Construction Safety Standards and adequately protect the workmen, asserted that the installation of the nets and constant modification of the forms was time consuming and costly and requested a change order to cover the costs of providing the nets as directed. The Bureau's reply, dated July 10, 1970 (Exh. 50), referred to steelworkers fastening templates and installing reinforcing steel 30 feet or more above the scaffolding and handrails and asserted that "These men are not protected and cannot be protected by safety belts and lifelines, or any other means." The quoted assertion was disputed (letter, dated August 20, 1970, Exh. 51), Hensel Phelps asserting that ironworkers on the job are presently using lifelines and safety belts in conformance with Bureau safety standards. Except for the demonstration period referred to hereinafter, steelworkers installing rebar and fastening template used safety belts but not lifelines (Tr. 31, 38, 70, 71).

The nets were installed on July 28, and 29, 1970, which was after construction of the piers exceeded 100 feet (Tr. 96). The Chief of the Bureau's Division of Safety visited the job site on October 6, 1970 (Travel Report, dated October 16, 1970, Exh. 95). Without elaboration, he concluded that the nets were necessary and should be utilized until the piers were completed. This conclusion was cited as justification for the Bureau's determination (letter, dated November 5, 1970, Exh. 55) that the nets were essential in order to provide protection for personnel working on the structures as well as to protect persons below from falling objects. Hensel Phelps referred to the Bureau's concern for personnel placing rebar as one reason the nets were required in a letter, dated November 24, 1970 (Exh. 57). The letter asserted that placement of reinforcing had been completed at Pier 2 and requested permission to eliminate use of nets on the remaining (concrete) pours. This request was denied by the Bureau in a letter, dated November 27, 1970 (Exh. 59).

By letter, dated February 11, 1971 (Exh. 67), Hensel Phelps asserted a claim in the amount of $19,262.42 of which $10,370.04 was for labor, $6,379.89 was for material, and $2,521.49 was for overhead and profit involved in the purchase, installation and continual moving and adjusting of the nets as the piers were constructed. The contracting officer denied the claim (Findings and Decision, dated September 4, 1973, Exh. 17) based upon his judgment that use of safety belts and lifelines was impractical because in many instances there was nothing upon which to tie lifelines and the work required more mobility than was possible using safety belts. As no attempt was made to justify the re-

quirement for the nets as necessary to protect personnel below from falling objects, the sole purpose of the nets indicated by the contracting officer's decision was to protect workers installing rebar and fastening template from possible falls.

The nets were installed just below the bracing for the uppermost scaffolding and had no purpose in protecting workmen on the two lower piers (Tr. 24). Steelworkers fastening template and installing rebar were protected from falls by lifebelts fastened to the vertical rebar, but as we have previously found did not normally use lifelines. Although Mr. Bird testified that neither he nor the workmen considered lifelines to be necessary (Tr. 71, 72), when the workmen unfastened their safety belts in order to move about they had no protection from falls (Tr. 74, 96). A test was conducted in which it was demonstrated that for one or two rebar placements the template could be raised while the men worked from lifelines inside the rebar (Tr. 25–26, 70–71). During this demonstration lifelines were fastened to the vertical rebar, there being no true structural numbers to which the lifelines could be fastened (Tr. 96, 97).

Mr. Donald Anderson, an engineer and principal inspector for the Bureau on the piers, gave a possible reason for discontinuing the use of lifelines after the test period. He testified that the template was raised inside the reinforcing steel and that "* * * It's not the best practice to stay under a load. They [steelworkers] would try to stay on the outside [of the rebar]" (Tr. 95). The photos (Exhs. 82–86, inclusive) show only one workman clearly inside the rebar (Exh. 85).

The piers were hollow and a workman who fell while working inside the rebar would have fallen on a decking over the hollow portion (Tr. 29). The nets, being on the outside of the piers, would afford no protection from such a fall. The piers were tapered or battered (Tr. 22) and Mr. Bird stated that a man working on the outside of the rebar whose safety belt gave away would land on the scaffolding rather than in the nets (Tr. 34, 38). He asserted that a man would have to jump in order to clear the handrail. He was of the opinion that the nets did not make the operation any more safe and that the necessity for workmen to crawl out on the net supports to engage and disengage the nets each time the forms were raised actually increased the hazards (Tr. 29, 84). Some support for this position is found in a statement attributed to the Bureau's Chief Safety Engineer, Mr. H. S. Latham,[2] at the conference in Denver on January 25, 1972 (App's. Exh. BB) to the effect that the nets as used were not too effective and probably were not really necessary in view of other safety measures adopted by Hensel Phelps.

[2] Mr. Latham had retired at the time of the hearing; and did not appear as a witness.

Decision

From our examination of photos (Exhs. 82–86, inclusive), we agree with Mr. Bird that under most circumstances a workman falling from outside the rebar would fall into the scaffolding rather than into the nets. However, Mr. Anderson was of the opinion that a man struck by a moving member, *i.e.*, from the crane, and knocked off the rebar at the elevation of the template would clear the scaffolding and fall into the nets (Tr. 97). While the chances of such an accident may be remote, we accept his opinion as evidence of an occurrence that could happen.

During the conference held in Denver on January 18, 1972, Hensel Phelps representatives are reported to have conceded that at the outset of the job they proposed the use of safety nets.[3] If this concession is taken to mean that Hensel Phelps contemplated the use of nets in conjunction with slip forming prior to award, then Mr. Bird's testimony that no provision was made in its estimate for the costs of utilizing safety nets could be literally accurate and still unavailing since the material cost of the nets could have been absorbed in the cost of the forms or omitted by mistake and the unanticipated labor costs incurred in the constant engaging and disengaging of the nets are attributable to the decision to use conventional rather than slip forming. While we have some doubts in the matter, we accept Hensel Phelps' position that it did not contemplate the use of safety nets prior to award.

The contract requirements are that "Employees * * * otherwise subjected to possible falls from heights not protected by fixed scaffolding, guardrails or safety nets shall be secured by safety belts and lifelines." Lifelines were to be secured to "* * * at least two substantial anchorages or structural members." While we accept Mr. Anderson's testimony that vertical reinforcing steel would not qualify as a structural member, there was no similar testimony that the reinforcing steel could not constitute "substantial anchorages." It is clear that reinforcing steel was of sufficient strength to support a man and that safety belts were fastened to this steel. We cannot on this record say that the reinforcing steel bars were not "substantial anchorages" within the meaning of the Safety Standard.

[1] The record would not support a finding that the Bureau directed the installation of safety nets in order to protect personnel below from falling objects. Accordingly, whether the Bureau's directives that safety nets be installed constituted a change depends upon the requirement of Section 7.7.1 of the Construction Safety Standards "Safety nets shall be installed * * * where the use of safety belts and

[3] Appellant's Exhibit BB. On posthearing brief (p. 5), appellant states "Initially, Hensel Phelps anticipated the use of safety nets with the metal [conventional] forms." We conclude that this statement refers to the period after award.

lifelines or other conventional type of protection is impractical." Hensel Phelps argues that the demonstration established that the use of safety belts and lifelines was practical and asserts (posthearing brief, p. 6) that rebar placers were not required to use lifelines after the test period because the safety nets had been installed. While plausible, we are not persuaded.

Safety nets were not installed until construction of the piers exceeded 100 feet in height and it would seem that if the use of lifelines and safety belts was practical they would have been used prior to the test period. It may well be that lifelines were not used prior to the installation of the nets simply because lifelines were considered to be unnecessary. However, we cannot overlook Mr. Anderson's testimony that the steelworkers desired to work outside of the rebar in order to stay out from under a load, *i.e.*, the template, as it was being raised. In any event, Hensel Phelps' contention that lifelines were not used after the test period because the nets had been installed is not supported by the record and is contrary to Hensel Phelps' present position that the nets served no useful purpose. We conclude that Hensel Phelps has not established that the use of safety belts and lifelines or other conventional type of protection was practical for workmen installing rebar.

Although as justification for requiring safety nets, the Bureau has relied almost in toto upon the contention that safety belts and lifelines or other conventional type of protection is not practical for workmen installing rebar at points above the uppermost scaffolding, the record is not such as to enable us to find that conventional type of protection was practical for all other workmen on the piers. Accordingly, we may not sustain the appeal as to this claim for the period subsequent to the completion of installation of rebar.

The safety net claim is denied.

Twenty-eight-Day Delay

Item No. 2 of the schedule called for the excavation at Piers 2 and 3 of an estimated quantity of 2,400 cubic yards below elevation 750. When structurally incompetent rock was discovered at Pier No. 2, Hensel Phelps was directed to remove this material, resulting in excavation of 1,603 yards below elevation 750 in excess of estimates. It is not clear when the directive to remove the incompetent rock was given.[4] All excavation was performed by a subcontractor of Hensel Phelps, Pacific Excavators.

In accordance with Paragraph 11 of the Special Conditions, the adjustment for the overrun was limited to the quantity exceeding 120 percent of the estimated quantity. Under date of December 14, 1970

[4] Hensel Phelps' letter, dated November 22, 1969 (Exh. 26), refers to an oral directive issued on November 19, 1969, to modify size, slope and location of footing below elevation 750 at Pier 3. A letter from Hensel Phelps dated February 5, 1970 (Exh. 35), refers to a directive issued on February 4 to perform additional excavation at the subbase of Pier 2. It may be that the pier numbers in these letters are reversed.

(Exh. 61), Hensel Phelps forwarded a claim in the amount of $7,939.61 based on a per yard cost of $17.09 ($7.09 in excess of the contract unit price of $10) and excavation of 1,123 yards in excess of 120 percent of the estimated quantity. Attached to the letter were 42 handwritten worksheets detailing total labor, equipment and material costs of $68,416.15 incurred in excavation below elevation 750. These figures were compiled and the claim prepared by the subcontractor, Pacific Excavators (Tr. 59, 60). Mr. Bird testified that the claim as submitted did not include any amount for overhead, standby costs or profit of Hensel Phelps (Tr. 60). However, there is nothing in the letter or so far as we can determine the enclosed worksheets,[5] which clearly indicates that costs claimed are limited to those of Pacific Excavators.

By letter, dated February 10, 1971 (Exh. 66), the Bureau advised Hensel Phelps that costs as submitted concerning the overrun of Schedule Item 2 included expenses not properly chargeable to that Item, among which were:

* * * * *

c. Stand by charges for equipment cannot be allowed until you present all necessary data required by Specification Paragraph 25 and your ownership expenses are computed in accordance with this paragraph.

d. Labor and equipment charges not substantiated by our records.

[5] The record copy of these worksheets is for the most part illegible. It is discernable, however, that listed equipment includes a pick-up, a Cat loader, John Deere and Case Backhoes, an airtrack drill and a compressor.

The worksheets enclosed with the claim letter of December 14, 1970, were returned with deductions marked in red. Total costs for excavation below elevation 750 were computed by the Bureau as $52,700 or $13.17 per cubic yard which minus the ten dollar contract unit price times the overrun quantity for which an adjustment was allowable (1,123 cubic yards) resulted in an amount due of $3,560. Hensel Phelps was advised that if it did not wish to present additional cost data or other information then an additional sum of $3,560 would be recommended to the contracting officer for payment.

Mr. Bird consulted with Pacific Excavators and determined that the amount computed by the Bureau was acceptable to the subcontractor (Tr. 61). He thereupon wrote a letter, dated March 19, 1971 (Exh. 71) advising the Bureau that no additional cost data or information would be submitted and that $3,560 for the overrun of Schedule Item 2 was acceptable. This agreement was incorporated into the contract by Order For Changes No. 8, dated April 16, 1971 (Exh. 14). A draft of Order For Changes No. 8 was forwarded to the office of the contracting officer in Denver by a letter from the project engineer, dated March 25, 1971 (App's. Exh. Z), which stated in part:

The contractor by letter dated March 19, 1971, copy enclosed, accepted my offer of $3,560 for higher costs of excavating Pier Nos. 2 and 3 below excavation 750. The offer made in a letter to the contractor, dated February 10, 1971, was

based on the actual cost for this work and I recommend acceptance.

Hensel Phelps requested an extension of time totaling 194 days of which 26 days were applicable to additional subbase footing excavation at Pier 2 (letter, dated March 16, 1970, Exh. 40). The basis for this request was further explained in a letter, dated April 3, 1970 (Exh. 44), wherein it was asserted that total subbase footing excavation for Pier 2 of 3.130 cubic yards occupied 74 days and that based on average daily production, the 1,080 yards in addition to the estimated quantity for this pier would require 26 days. The contracting officer considered this request and others for extensions of time (Findings and Decision, dated August 17, 1970, Exh. 10). He determined that the contractor spent 44 working days excavating a total of 3,070 cubic yards below elevation 750 at Pier No. 2 completing the work on February 17, 1970 (see note 4). This computes to excavation of approximately 70 cubic yards per working day so that the quantity in addition to the estimate (here stated as 1,653 cubic yards) was determined to require 24 working days or 28 calendar days based on a 6-day work week. An extension totaling 62 calendar days was granted of which 28 days were for the additional excavation. The Findings and Decision was transmitted to Hensel Phelps by letter, dated August 25, 1970 (Exh. 52).

Hensel Phelps acknowledged receipt of the Findings in a letter, dated September 17, 1970 (Exh. 54), which stated, *inter alia*, that no appeal therefrom would be taken. The letter further stated that with the job delay of 62 days established, it was now appropriate to prepare and submit a claim for the additional costs incurred as a result of the delay. Mr. Bird testified that it was then Hensel Phelps' standard practice to price delay costs only after the extent of delay was known.[6] The claim in the amount of $110,549.91 was submitted by letter, dated February 26, 1971 (Exh. 69). The letter incorrectly referred to Change Order No. 5 as granting the 62-day extension, referred to its transmittal letter accepting the 62-day extension which asserted that a claim would be presented for costs attributable to the delay, and stated in part:

> These charges, summarized on the attached sheets, cover the standby charges for equipment which was not utilized during this period, including standby rental on the concrete batching facilities. In addition, we had some miscellaneous charges for utilities and other items. The delay to the job also projected a number of our operations, involving labor expenditure, into a higher wage period for union craftsmen's salaries * * *.

The supporting data included a letter from Vancon, Inc., the concrete subcontractor, dated September 9, 1970, which computed costs, including overhead and profit, attributable to the 62-day delay period of $63,658.15. Over $34,000 of this sum

[6] Tr. 69. This practice was undoubtedly developed in response to the Rice Doctrine. See *Gallup Construction Company, Inc.*, AGBCA No. 283 (June 12, 1972), 72-2 BCA par. 9522.

was attributed to standby costs for equipment computed at Associated General Contractor's equipment rates.

The project engineer forwarded the claim to the contracting officer by a letter, dated April 7, 1971 (App's. Exh. AA), which stated in part:

> The delay under Item 1 resulted from an overrun of quantities in excess of 120%. The contractor has agreed to a lump sum price increase of $3,560 for the extra costs of the overrun, and this amount is included in a draft of Order for Changes No. 8 forwarded to your office by my letter of March 25, 1971. * * * Please advise me what, if any, liability the Government has for the delays claimed. * * *

The letter contains no hint that the project engineer considered that Hensel Phelps' agreement to accept the sum of $3,560 for the overrun precluded the instant delay claim and, in fact, supports the opposite conclusion. The contracting officer denied the claim for the reason that Hensel Phelps' acceptance of the offer made in the project engineer's letter of February 10, 1971, and its execution of Order For Changes No. 8 constituted an enforceable agreement which could not be modified without additional consideration to the Government (Findings and Decision, dated September 4, 1973, Exh. 17).

Decision

On brief (p. 15), Hensel Phelps argues that the Government knew or should have known that the $3,560 settlement for the actual cost of the additional excavation did not include delay costs incurred during the period the additional work was performed. We would have little difficulty accepting this argument, but for the fact that the cost breakdown submitted with Hensel Phelps' letter of December 14, 1970, included some equipment standby costs. While it now appears that costs for equipment included in the breakdown were limited to equipment owned or operated by the subcontractor, Pacific Excavators, there is nothing in the letter or so far as we can determine the cost breakdown (note 5, *supra*) so limiting the claim. It might, of course, be argued that the limited equipment listed on the worksheets together with the Bureau's knowledge of the purpose for which the equipment was utilized, constitutes, as a minimum, evidence from which constructive knowledge that the claim included only costs of the subcontractor should be chargeable to the Bureau. We find it unnecessary to reach this issue in order to decide the question before us since we conclude that on this record, the Bureau could not reasonably have contemplated that Hensel Phelps was settling its delay claim of February 26, 1971, at the time it conveyed its acceptance of the $3,560 settlement to the Bureau.[7]

[7] Since we consider that this claim is cognizable only under the "Changes" clause, cases such as *Alrac Construction Company, Inc.*, VACAB No. 970 (January 31, 1973), 73-1 BCA par. 9872, holding that agreement on an amount due under the Changes clause does not preclude assertion of a claim under the Suspension of Work clause, are not applicable.

[2] By its letter of February 10, 1971, the Bureau informed Hensel Phelps of its review of the claim of December 14, 1970, which resulted, *inter alia*, in the disallowance of equipment standby costs upon the ground that such costs had not been computed and substantiated in accordance with Paragraph 25 of the specifications. Hensel Phelps filed the delay claim presently before us by letter, dated February 26, 1971, which made no reference to the claim of December 14, 1970, or the Bureau's response thereto, but which did refer to its transmittal letter of September 17, 1970, which had accepted the Findings of Fact of August 17, 1970, granting the 62-day extension and which informed the Bureau that a claim would be submitted for the additional costs incurred as a result of the delay. Hensel Phelps' letter of March 19, 1971, accepting $3,560 as a settlement for the overrun quantity of bid Item 2 referred to the Bureau's letter of February 10, 1971, and made no reference to its delay claim of February 26, 1971. It is clear that Hensel Phelps considered the claim for the overrun quantity and the delay claim as separate and the Bureau could not reasonably conclude otherwise since the delay claim had not been submitted when the Bureau, on February 10, 1971, transmitted to Hensel Phelps the results of its review of the overrun claim. It is, therefore, clear that the delay claim was not contemplated as within the settlement of the overrun claim and it is well settled that an agreement will not operate as an accord as to matters not contemplated by the agreement.[8]

A quite similar case is *Gallup Construction Company, Inc.*, note 6 *supra*, cited by appellant. There the appellant agreed orally to a price adjustment for a change and subsequently executed a modification formalizing the adjustment. Subsequent to the oral agreement but prior to execution of the modification, appellant submitted a separate claim for costs of equipment made idle because the change had the effect of preventing the contractor from proceeding with certain portions of the work. The Board ruled that although the delay costs should have been anticipated and included in the modification formalizing the price adjustment resulting from the change, there was no evidence that the appellant manifested any intention of relinquishing the claim for idled equipment at the time it executed the modification. The appeal was sustained.

We hold that the defense of accord and satisfaction to the instant delay claim has not been substantiated. This claim is sustained as to liability and remanded to the contracting officer.

Twenty-day Delay Claim

This claim concerns another portion of the 62-day extension granted

[8] *E. E. Steinlicht*, IBCA-834-4-70 (March 12, 1971), 71-1 BCA par. 8767 and *Richard K. W. Tom, Inc.*, ASBCA No. 7948 (October 9, 1962), 1962 BCA par. 3537. See also *S. W. Electronics & Manufacturing Corp.*, ASBCA No. 17,523 (May 23, 1974), 74-2 BCA par. 10,650.

Hensel Phelps by the Findings, dated August 17, 1970 (Exh. 10). In order to understand the theory upon which the claim is presented it will be necessary to briefly detail certain background matters not presently in issue.

Excavation at Pier 3 above elevation 756 to the lines and grades shown on the plans resulted in an unstable slope condition. Discussions were held at the job site and Hensel Phelps was directed to flatten or reduce the angle of the slope thus requiring additional excavation (Tr. 41, 42). The Bureau directed similar design changes at Pier 2. However, design changes at Pier 2 were apparently accomplished prior to the performance of any extensive excavation. Hensel Phelps referred to this situation and the Bureau's directives to change the angle of the slopes in a letter, dated July 28, 1969 (Exh. 19). Hensel Phelps estimated that the additional excavation would approximate 40,000 to 50,000 yards at Pier 3 and 20,000 to 30,000 yards at Pier 2. Hensel Phelps proposed to perform the additional excavation at the contract unit price subject to certain conditions among which were that the delay and resulting additional costs could not be determined until the additional excavation was completed, that the Bureau would be responsible for certain equipment rental and overhead costs as well as any overtime or shift work which might be required in order to complete concrete work to a higher and safer elevation prior to the anticipated rains. Hensel Phelps estimated that the additional excavation would require approximately four weeks (Tr. 42).

The Bureau took the position that since Pacific Excavators was performing the excavation at $1.95 per cubic yard, overhead and standby equipment costs should be absorbed in the $.55 per yard difference between Pacific Excavators' price and the contract price of $2.50 (Tr. 43, 44; memorandum, dated August 19, 1969, summarizing discussion at a meeting with Hensel Phelps' representatives on August 15, 1969, App's. Exh. E). Hensel Phelps subsequently agreed to perform the additional excavation at the contract price which would include all overhead and standby equipment charges resulting therefrom (Tr. 42; letter, dated September 2, 1969, Exh 22). However, certain conditions of its original proposal were reiterated including:

* * * * *

6) At the completion of the foundation excavation and clean up, additional overtime, or shift work under lights at night might be in order in an effort to complete the concrete to a higher and safer elevation prior to any anticipated rain. We propose that the Bureau would be responsible for any such additional expense.

7) Further, if in spite of all efforts any clean up or problems from material washing down from the slopes does occur because of the delays resulting from the additional excavation, we feel that the Bureau should also be responsible for any additional costs resulting from this condition.

Mr. Bird testified that in writing the letter of September 2, 1969, he intended that the unit price cover standby costs and actual costs incurred only during the period required to perform the additional work (Tr. 44, 56, 59). He was of the opinion that the matter of additional costs attributable to subsequent delays caused by the additional excavation was left open (Tr. 46).

The project engineer replied to Hensel Phelps' letter of September 2 on September 16, 1969 (Exh. 23) stating that payment for excavation to changed slopes at Piers 2 and 3 would be made at contract unit prices and that additional time would be allowed when the extent of the delay was known. The letter closed with the following: "Under existing circumstances, we cannot agree to pay for expediting concrete work, and you must use your own judgment as to scheduling the work, including consideration of any possible cleanup costs if work is inundated."

Mr. Donald Alexander, office engineer for the Bureau at the project and under whose direction the project engineer's letter of September 16, 1969, was written, testified that he thought the offer in Hensel Phelps' letter of September 2 "* * * included, along with other items that were agreed to, the total payment that is involved in this over-excavation." (Tr. 111.) He did not anticipate that there would be any later payment for impact delay or anything else. He admitted, however, that the Bureau did not accept Hensel Phelps' offer in its entirety (Tr. 113). This admission is compelled by the project engineer's letter of September 16, 1969, which rejected in part certain conditions of Hensel Phelps' offer.

It developed that total additional excavation approximated 125,000 yards and that additional excavation at Pier 3 required 82 days (Tr. 45, 58). Because the additional excavation consumed more time than anticipated, the difference between the contract unit price and the amount paid Pacific Excavators was insufficient to cover all of the delay costs.[9]

In a letter, dated January 7, 1970 (Exh. 30), Hensel Phelps stated that it would accept 82 days as an extension for the additional excavation at Pier 3, but that this period did not accurately reflect total delay to the project. The letter pointed out that additional excavation was required at Pier 2 and that delaying footing operations into the winter months resulted in inefficiency, delays and additional cleanup time. It was further stated that Hensel Phelps had no way of knowing what effect rain and weather would have on operations since rain, mud and rocks from the slopes could further

[9] Tr. 54, 55, 57–59. The concrete subcontractor, Vancon, Inc., submitted a claim to Hensel Phelps in the amount of $70,530 for the standby labor and equipment and general and administrative expenses incurred during the period August 1 through November 30, 1969 (letter, dated November 28, 1969, App's. Exh. H).

delay the work until footing concrete in Piers 2 and 3 was above elevation 755.

By letter, dated January 19, 1970 (Exh. 33), Hensel Phelps referred to previous letters concerning delays to the job because of additional excavation at Pier 3. The letter alleged that heavy rains had resulted in mud, rocks and water in the Pier 3 footing area, the removal of which would require additional work. It was stated that a daily record would be kept of labor, material and equipment charges incurred in the additional work which would serve as the basis for a claim when the additional costs could be determined. Claims for costs of cleanup work were submitted to the Bureau by Hensel Phelps' letters, dated March 19 and May 21, 1970 (App's. Exhs. L and M). The project engineer forwarded the claims to the contracting officer (memorandum, dated August 7, 1970, App's. Exh. S). In a memorandum, dated August 31, 1970 (App's. Exh. U), the contracting officer advised the project engineer that since the additional cleanup work would apparently have been unnecessary but for the delay caused by the resloping at Piers 2 and 3, the contractor was entitled to an equitable adjustment. Cleanup costs totaling $5,843.84 resulting from storm damage to footing areas of Piers 2 and 3 were paid under Order For Changes No. 7, dated January 20, 1971 (Exh. 13).

The contracting officer considered Hensel Phelps' request for an extension of time (Finding of Fact, dated March 9, 1970, Exh. 6). He determined that resloping operations at Pier 3 commenced on July 23 and were completed on October 13, 1969, and granted an extension of time totaling 82 days for the additional excavation. However, he denied the request for an extension of unspecified length at Pier 2 because he found that additional excavation at this pier proceeded concurrently with excavation at Pier 3. He recognized that the contractor might incur further delays since excavation and concrete work had been extended into the wet winter months. The findings stated that any such delays would be considered at a later date at the contractor's request. Hensel Phelps acknowledged receipt of the findings in a letter, dated April 30, 1970 (Exh. 46), which stated that no appeal would be taken therefrom.

Hensel Phelps summarized delays to the job totaling 194 days of which 38 were attributable to weather during the months of December 1969 and January and February 1970 (letter, dated March 16, 1970, Exh. 40). The delays were further explained in a letter, dated April 3, 1970 (Exh. 44), which stated that there were 15 unworkable days due to weather conditions in December 1969, 18 in January and four in February.

In a Findings of Fact, dated August 17, 1970 (Exh. 10), the contracting officer determined that Hensel Phelps had experienced heavy rains constituting unusually severe weather during December

1969 and January 1970, which delayed the work a total of 17 working days. The findings included the following:

> The amount of time the contractor should have anticipated being shutdown during normal adverse weather in December and January cannot be accurately determined. However, an average of 4 days in each of these months is a reasonable estimate because the contractor would have been placing concrete in Piers 2 and 3 instead of working on foundation excavation if he had not been delayed 82 days provided for in Findings of Fact dated March 9, 1970, and concrete work could have proceeded on days when muddy conditions would preclude or hamper excavation operations. * * *

Based on a six-day work week, 17 working days converted to 20 calendar days, which was the extension granted by the contracting officer. As noted previously, this 20-day extension was a portion of an extension totaling 62 days.

Hensel Phelps informed the Bureau that it would accept this extension in a letter, dated September 17, 1970 (Exh. 54), which stated that it was now in order to prepare a claim for the additional costs incurred as a result of the delay. The letter stated in part:

> The acceptance of the unit price for removing the additional material at Piers 2 and 3 was based on the unit price including compensation to cover the additional costs of overhead and standby charges for such equipment as the concrete batch plant and trucks. The additional costs for overhead and supervision as well as costs for equipment time caused by the job delay of sixty-two days has not been allowed for. We are in the process of preparing a detailed summary of the additional costs for which we feel we are entitled compensation as a result of the sixty-two days delay. * * *

The claim in the total amount of $110,549.91 for costs attributable to the 62-day delay was submitted by letter dated February 26, 1971 (Exh. 69).

Mr. Bird testified that the present claim did not include any portion of the Vancon claim of November 28, 1969 (note 9, *supra*). When asked why, he replied: "Well, basically, because this additional charge for equipment delay and standby charges occurred during a period that we agreed with the Bureau that the unit cost or the unit price we were getting would take care of such costs." (Tr. 55.) He further testified that no amount of the present claim was included in the proposal to perform the extra excavation at the contract unit price (Tr. 53, 55). His intention was that the unit price cover actual costs of the excavation and standby costs only during the period required to perform the work (Tr. 56). He stated that but for the additional excavation the piers would have been at a higher elevation and the rains would not have hampered the work to the extent they did (Tr. 51). The Government has made no attempt to rebut this testimony and no attempt to demonstrate that any portion of either the 82-day or 62-day delays were in any way attributable to lack of diligence or fault of Hensel Phelps. The record would not support any such finding.

The contracting officer denied the claim for the reason that it was for

costs attributable to unusually severe weather for which the contract made no provision for compensation or it was for costs attributable to the change in excavation of slopes at Pier 3, which had been settled by the contractor's agreement to accept and the Government's payment of the contract unit price for such excavation.

Decision

Although admitting that the 20-day delay resulted from winter weather, Hensel Phelps asserts that this is not the type of weather delay for which the contractor is not entitled to reimbursement and argues that the claim is for an impact delay which is the proper subject of an equitable adjustment (posthearing brief, p. 24). No authority is cited to support this argument. It is apparent that characterizing a claim as for impact delay adds nothing to its validity.[10]

Costs here claimed are apparently labor inefficiencies attributable to the work being behind the schedule obtainable during the rainy winter months but for the directed change which required additional excavation. The claim as asserted is not without difficulty since there is substantial authority for the proposition that recoverable direct costs must flow from the delay to the project as a whole and be directly chargeable to that delay and that recoverable indirect costs are those incurred during the delay period itself.[11] Under this view the claim would necessarily be denied, since the delay period in this context would seem to be the 82-day period required to perform the additional work and costs attributable to a subsequent period of rainy weather would not appear to be directly chargeable to the prior delay. The contracting officer's recognition in the findings of March 9, 1970, that some further excusable delay might result from the excavation and concrete work being extended into the winter weather would not seem to change the result, since it is well settled that a finding of excusable delay based on acts of the Government does not, without more, equate to liability either for damages as a breach [12] or under a Suspension of Work Clause.[13] We note that even in a breach case, delays incident to inclement weather have been eliminated from the recovery period.[14]

[10] So-called "impact cost claims" usually result from multiple changes where it is difficult or impossible to determine the effects in terms of time and cost attributable to particular changes. *See Maintenance Engineers*, ASBCA No. 17474 (July 8, 1974), 74-2 par. 10,760 wherein, *inter alia*, impact cost claims are described as being beset with many of the pitfalls and closely related to the total cost theory.

[11] See *Liles Construction Company, Inc.*, ASBCA Nos. 11919 *et al.* (May 31, 1968), 68-1 BCA par. 7067 and cases cited at 32,668. This case was reversed on other grounds, *Liles Construction Company, Inc.* v. *United States*, 197 Ct. Cl. 164 (1972).

[12] *Dean Construction Company* v. *United States*, 188 Ct. Cl. 62 (1969).

[13] *Alrac Construction Company, Inc.*, note 7, *supra*.

[14] *Laburnum Construction Corporation* v. *United States*, 163 Ct. Cl. 339 (1963).

[3] However, recovery for the increased costs of working in the winter months or during the rainy season has been allowed under the Suspension of Work Clause where that was the inevitable effect of the suspension.[15] The view that recovery in such a case must be under the Suspension of Work clause is, of course, based on the "Rice Doctrine" which, to the extent that it precluded an adjustment for the increased costs of unchanged work, is no longer applicable. The Suspension of Work clause in the instant contract precludes an adjustment which is provided for or excluded under any other provision of the contract and it would appear that the instant claim is allowable only under the Changes clause. See *Gallup Construction Company, Inc.*, note 6, *supra*. We conclude that the decisions (notes 11 through 14, *supra*) which would disallow costs similar to those here claimed represent nothing more than application of the general rule that damages for breach must be the direct as distinguished from the remote consequence of the breach.[16] The record would not support a finding that any portion of the delays were attributable to fault of Hensel Phelps. While this finding is insufficient in and of itself to shift costs attributable to inclement weather to the Government, we conclude that increased costs of work performed in the rainy, winter weather, which are the direct and inevitable consequence of a change and which would not otherwise have been incurred but for the change, are recoverable under the Changes clause.[17]

Having concluded that the instant claim may not be disallowed on the ground that it represents costs incurred in working in unusually severe weather, the Government's second defense of accord and satisfaction need not long detain us. It is hornbook law that in order for a binding agreement to exist there must be no material variance between the offer and the acceptance.[18] Here Hensel Phelps' offer in its letter of September 2, 1969, to perform the additional excavation at the contract unit price was clearly conditional upon the Bureau's agreement to pay for overtime and shift

[15] See *T. F. Scholes, Inc.*, ASBCA No. 5010 (February 29, 1960), 60–1 BCA par. 2555; *United Contractors*, ASBCA No. 6142 (February 28, 1962), 1962 BCA par. 3314 at 17,071–074, affirmed on this point, *United Contractors* v. *United States*, 177 Ct. Cl. 151 (1966); *E. V. Lane Corp.*, ASBCA Nos. 9741, *et al.* (August 31, 1965), 65–2 BCA par. 5076 at 23,883, and *A. F. Drexler, d/b/a Drexler Construction Company*, ASBCA Nos. 12249 and 12316 (March 20, 1969), 69–1 BCA par. 7572.

[16] See, *e.g.*, *William Green Construction Company et al.* v. *United States*, 201 Ct. Cl. 616 at 626–27, *cert. denied*, 417 U.S. 909 (1974).

[17] *Montgomery Macri Company and Western Line Construction Company, Inc.*, IBCA–59 and IBCA–72 (June 28, 1963), 70 I.D. 242 at 337 *et seq.*, 1963 BCA par. 3819 at 19,055–062. *Cf. D. H. Dave & Gerben Contracting Co.*, ASBCA No. 13005 (June 7, 1973), 73–2 BCA par. 10,191 at 47,999 (where Suspension of Work clause did not exclude profit, it was unnecessary to decide whether recovery was under Suspension of Work, Changes or Changed Conditions clauses).

[18] *Bromley Contracting Company, Inc.*, VACAB No. 1112 (January 17, 1975), 75–1 BCA par. 11,029 and cases cited.

work which might be necessary in order to complete the concrete work to a higher and more safe elevation prior to anticipated rains and to the Bureau's agreement to be responsible for cleanup costs resulting from the delays caused by the additional excavation. The project engineer's letter of September 16, 1969, while accepting the unit price, flatly rejected both conditions. The Bureau subsequently agreed to and did pay for cleanup costs which would not have been required but for the delays incident to the additional excavation. It could as logically have been contended that the claim for cleanup costs was also barred by Hensel Phelps' offer to perform the additional excavation at the contract price.

The appeal on this claim is sustained as to liability and remanded to the contracting officer.

Fourteen-day Delay Claim

This claim is based upon a Bureau directive, issued on February 26, 1970, that a steel sheet pile bulkhead be installed at Pier 3. Hensel Phelps referred to this verbal directive in a letter, dated March 2, 1970 (Exh. 38), which stated in part: "We propose to furnish the necessary labor, material and equipment to construct a protective bulkhead at Pier 3 using steel sheet piling and structural steel bracing and walers * * *." The letter described certain design details of the proposed bulkhead, stated that the price did not include the removal of any part of the brace structure or the steel sheet piling, but did include an allowance for a 20- or 30-foot section of used six-foot chain link fencing to be located as directed by the Bureau and stated: "Our total lump sum price to construct the protective steel sheet pile bulkhead as outlined above is $12,210."

In a letter, dated March 13, 1970 (Exh. 39), Hensel Phelps stated that work on the protective steel bulkhead was begun on Wednesday, March 4 and completed on March 11, 1970. Hensel Phelps asserted that during construction of the bulkhead it was necessary to suspend other operations in the footing area at Pier 3, alleged that total delay to the job amounted to one and one-half weeks and requested an extension of time of ten calendar days. The project engineer accepted the lump-sum price of $12,210 for the installation of the sheet piling and advised Hensel Phelps that an order for changes would be issued as soon as practicable (letter, dated March 17, 1970, Exh. 41). As to the time extension, Hensel Phelps was informed that its request for an extension of ten calendar days would be considered along with other delays. Hensel Phelps was urged to submit all claims for time extensions so that all alleged delays could be considered together.

Hensel Phelps summarized and explained various delays to the job in letters, dated March 16 and April 3, 1970 (Exhs. 40 and 44). In the latter letter delay resulting from

the installation of the sheet pile bulkhead was alleged to be from February 26 to March 11, 1970, or 14 days.

Order For Changes No. 3, dated February 27, 1970 (Exh. 5), directed, among others, the following change:

> 4. Furnish and install approximately 86 lineal feet of used 30-foot MP–115 steel, sheet piling bulkhead at elevation 750 along the east face of Pier No. 3, and remove at a later date and dispose of that portion of the sheet piling above elevation 765.

A later section of the order referred to the bulkhead as described above and stated that the contractor would be paid therefor the lump sum of $12,210. Although the order for changes clearly includes the removal and disposal of piling above elevation 765, and Hensel Phelps' letter of March 2, 1970, stated that its lump-sum price did not include removal of sheet piling, Hensel Phelps signed and accepted the order as satisfactory on April 24, 1970. The order stated that additional time required for performance of the work covered by the order could not be determined at this time.

The contracting officer's Findings of Fact, dated August 17, 1970 (Exh. 30), extending the time for completion of the work by 62 days included 14 days for the installation of the sheet pile bulkhead. As noted previously in connection with the 28-day and 20-day delay claims, Hensel Phelps accepted the 62-day extension in a letter, dated September 17, 1970 (Exh. 54), which advised the Bureau that it was now in order to prepare and submit a claim for the additional costs incurred as a result of the delay. The claim in the amount of $110,549.91 was submitted by letter, dated February 26, 1971.

The contracting officer denied the claim for the reason that Hensel Phelps' offer to construct the bulkhead for the lump sum of $12,210, the Government's acceptance of this offer and Hensel Phelps' unqualified acceptance of Order For Changes No. 3 constituted a binding agreement which could not be changed without new consideration to the Government.

Mr. Bird's unrebutted testimony was that the lump-sum price of $12,210 for constructing the bulkhead was the direct cost of labor, material and equipment and did not include overhead or the cost of standby equipment during the period required to perform the work (Tr. 66). He further testified that no part of Hensel Phelps' present claim ($15,706.88 as stated in the complaint) for the 14-day delay was included in the lump-sum price of the work signed and agreed to in Order For Changes No. 3 (Tr. 67).

Decision

We think it clear that the contracting officer's decision on this claim was correct.

Hensel Phelps argues that the record is clear that the lump sum proposal did not include delay costs

and that the Bureau knew or should have known that the proposal covered only the actual cost of performing the work (brief, p. 27). We agree with the former assertion, but find no persuasive evidence to support the latter. It is, of course, not unusual to separate the cost of additional work attributable to a change from the time required for its performance and it is clear that the time extension due Hensel Phelps for the change was to be considered at a later date. Nevertheless, Hensel Phelps by its letter of March 2, 1970, offered to furnish the necessary labor, material and equipment to construct the bulkhead for a total lump-sum price of $12,210 and the Bureau accepted the offer in a letter, dated March 17, 1970. Although Order For Changes No. 3, which formalized the change contained a provision for the removal of a portion of bulkhead above elevation 765 and Hensel Phelps' offered price expressly excluded the removal of any part of the bracing or steel sheet piling, Hensel Phelps executed and accepted the order for changes without qualification. Accordingly, any variance between the terms of the offer and the language of the change order is not relevant.

[4] It is well settled that the contractor's acceptance of a change order which establishes the amount due therefor without reserving or excepting any additional costs or later claims constitutes an accord precluding the successful assertion of a subsequent claim for any additional amount because of the change.[19] The Bureau's knowledge that the extension of time attributable to the change was to be considered at a later date is insufficient to change this rule. The factual situation with respect to this claim is clearly distinguishable from that regarding the 28-day claim where the delay claim was pending at the time Hensel Phelps accepted the Bureau's determination of the amount due for the change and it was clear that Hensel Phelps did not intend the settlement to include the delay claim and we have found that the Bureau could not reasonably have concluded otherwise.

The 14-day delay claim is denied.

Twenty-two-Day Delay Claim

In a letter, dated December 10, 1970 (Exh. 60), Hensel Phelps requested an extension of unspecified length due to unusually severe weather. The letter pointed out that as of December 1 total rainfall was over 15 inches as compared to the ten-year average of just over five inches. Hensel Phelps referred to its letter of December 10 and asserted a claim in the amount of $39,827.72 for additional costs in the form of standby charges for equipment and supervisory personnel during the delay period (letter,

[19] *Seeds & Derham* v. *United States*, 92 Ct. Cl. 97, *cert. denied*, 312 U.S. 697 (1941); *E. E. Steinlicht* note 8, *supra* and *Modenco Corporation*, PSBCA No. 12 (August 15, 1973), 73-2 BCA par. 10,192. See also *Penjaska Tool Company*, ASBCA Nos. 17075 and 18071 (September 28, 1973), 73-2 BCA par. 10,328.

dated March 19, 1971, Exh. 72). The letter alleged that total delay to the project during the winter of 1970–71 was 25 calendar days and asserted that but for the 82-day delay and the subsequent 62-day concrete work on Piers 2 and 3 would not have been projected into the winter of 1970–71.

The contracting officer considered Hensel Phelps' request for an extension of time in a Findings of Fact, dated September 22, 1971 (Exh. 16). He determined that the contractor was prevented from working or worked at only 50 percent of efficiency because of rain 13 work days or 18 calendar days during the period October 20 through December 4, 1970. In addition, he determined that the contractor was delayed by adverse weather three working days or four calendar days during the 18-day period subsequent to December 6, 1970. He, therefore, granted Hensel Phelps an extension totaling 22 days. The findings included the following:

> The adverse weather thus prevented the contractor from working on days which were intended to make up for previous delays found excusable under the contract. The allowable time must, therefore, be further extended by the number of calendar days equivalent to the working days lost due to the adverse weather during the extended contract time to ensure full restoration of the previous extension of time.

The contracting officer denied the claim for the reason that it was for increased costs attributable to unusually severe weather for which the contract made no provision or was the result of the previous 82-day and 62-day delays which extended the work into the winter. He determined that an enforceable agreement existed as to the compensation resulting from the 82-day delay and that since no proper basis existed for allowing any additional sum because of the 62-day delay, the same ruling was applicable to the instant, subsequent claim.

Mr. Bird testified that the bridge substructure was completed " * * * right after the first of the year in 1971." (Tr. 67, 68.) He stated that but for the 82-day and 62-day delays construction would have been completed in October of 1970 and the winter weather of 1970–71 would not have been a factor. The Government has not alleged or attempted to show and the evidence would not support a finding that any of the delay was due to lack of diligence or fault of Hensel Phelps.

Decision

While the relationship between the slope change and the instant delay is more remote, liability here is controlled by our decision on the 20-day delay claim. Of course, recovery is limited to costs which are shown to be the inevitable result of the change and which would not have been incurred but for the change.

The appeal as to this claim is sustained and remanded to the contracting officer.

Conclusion

The appeal is sustained in part and denied in part as indicated.

SPENCER T. NISSEN,
Administrative Judge.

WE CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

ZEIGLER COAL COMPANY

(On Reconsideration)

4 IBMA 139

Decided *May 13, 1975*

Petition by the Mining Enforcement and Safety Administration for reconsideration of the Board's opinion and order in the above-captioned docket reversing a decision by Administrative Law Judge James A. Broderick which upheld the validity of an unwarrantable failure withdrawal order issued pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Reaffirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Notices of Violation

Under section 105(a) of the Act, 30 U.S.C. § 815(a) (1970), an operator may file an application for review of a section 104(b) notice of violation with 104(c)(1) findings only if it wishes to challenge the reasonableness of time fixed for abatement. Subsequent to abatement, review of such notice under section 105(a) may be obtained only as an incident to the review of a related section 104(c)(1) withdrawal order.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, Madison McCulloch, Esq., for petitioner, Mining Enforcement and Safety Administration; Steven B. Jacobson, Esq., Richard L. Trumka, Esq., for appellee, United Mine Workers of America; J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Guy Farmer, Esq., Lynn Poole, Esq., for intervenor, Bituminous Coal Operators' Association.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

On December 10, 1974, we handed down an opinion and order wherein we reversed a decision upholding the validity of a withdrawal order which had been issued at the No. 4 Mine of Zeigler Coal Company (Zeigler) by a federal coal mine inspector pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(c)(1) (1970). Subsequently, on January 13, 1975, the Mining Enforcement and Safety Administration (MESA) filed a timely Petition for Reconsideration pursuant to 43 CFR 4.604. Having concluded that further exploration of the issues here involved was warranted, we granted the petition, called for fresh briefs, and held oral argument. Upon full reconsid-

eration, we have decided to reaffirm our initial decision as clarified herein.

I.

Procedural and Factual Background

The withdrawal order, 1 HG, which is the subject of this controversy was issued on May 11, 1972, and cited Zeigler for an alleged violation of 30 U.S.C. § 864(a) (1970), 30 CFR 75.400, which proscribes "accumulations" of combustible materials and requires their clean-up. Subsequent to the abatement of the subject violation, Zeigler filed an Application for Review of the instant withdrawal order in the Hearings Division pursuant to section 105 of the Act. 30 U.S.C. § 815 (1970).

Thereafter, Answers in opposition were filed respectively by MESA and the United Mine Workers of America (UMWA), as a representative of the miners at the Zeigler No. 4 Mine. A hearing on the merits was held by Administrative Law Judge James A. Broderick on June 20, 1973, at which time all parties were represented.

Judge Broderick issued his decision on November 13, 1973, and Zeigler then noted a timely appeal therefrom on November 26, 1973. Pursuant to proper motion, on December 14, 1973, we granted leave to intervene to the Bituminous Coal Operators' Association (BCOA). Timely briefs were then filed by Zeigler, MESA, and BCOA. The UMWA had notice of the appeal but nevertheless apparently chose not to participate since it filed no brief.[1]

On appeal, Zeigler contended that the subject withdrawal order was invalid on four grounds. First, it argued that there was no proof of the existence of an underlying notice of violation issued pursuant to section 104(c)(1) of the Act. Second, it asserted that Judge Broderick erroneously concluded that he need *not* find that the violation cited in the subject section 104(c)(1) withdrawal order "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." Third, it insisted that the alleged violation cited in the subject withdrawal order was not the product of an unwarrantable failure to comply. Finally, it submitted that the masses of material found by the inspector were too wet to be combustible and thus were not in violation of the Act.

We decided in favor of MESA with respect to Zeigler's first argument, holding that the record contained an admission by a witness called to the stand by Zeigler which established the existence of the alleged underlying notice of violation. However, we held with Zeigler on its second contention and reversed, concluding that, if challenged, it must be proved that a 104(c) viola-

[1] The UMWA did not participate in the initial stage of this appeal, but none of the parties has interposed an objection to the filing of the Union's brief on reconsideration or its participation in the ensuing oral argument. *See Old Ben Coal Corp.*, 4 IBMA 104, 82 I.D. 160, 1974–1975 OSHD par. 19,511 (1975).

tion "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard." We found it unnecessary to deal with the two remaining questions presented.

In the course of dealing with the first question, concerning the sufficiency of the proof of the existence of the underlying notice, we denied a preliminary objection raised by MESA on jurisdictional grounds. MESA argued that Zeigler could have filed an Application for Review of the notice by itself within 30 days of its issuance under section 105 of the Act, 30 U.S.C. § 815(a) (1970), and having failed to do so, was barred from raising any question with respect to it thereafter. We rejected that argument, holding that, having timely filed an Application for Review of the subject section 104(c)(1) withdrawal order, Zeigler had fully invoked the review jurisdiction of the Secretary regarding any allegation of invalidity concerning such withdrawal order, including the lack of an underlying notice of violation. In dictum, we indicated that even if Zeigler had been aware of the underlying notice and had wanted to challenge the validity of such notice prior to the issuance of the subject withdrawal order, it could not have done so by filing an Application for Review.

On January 13, 1975, MESA petitioned the Board to reconsider its decision. By order dated January 14, 1975, the Board granted MESA's petition. Subsequently, timely briefs by all parties including the UMWA were filed. Oral argument before the Board took place on March 10, 1975.

MESA in its brief on reconsideration challenges our decision in a number of respects. Only two of the objections raised require further comment, the others being without merit and too insubstantial for extended discussion.[2] In particular, we are giving further attention in this opinion to defining the Secretary's review jurisdiction under section 105 of the Act, as we understand it, over notices of violation issued pursuant to section 104(c)(1) and to the gravity prerequisite, if any, of a valid 104(c)(1) withdrawal order.

II.

Issues on Reconsideration

A. Whether the Board erred in concluding that Zeigler Coal Company was not jurisdictionally barred from claiming that the subject section 104(c)(1) withdrawal order was invalid on the ground that there was no underlying notice of violation.

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[2] MESA has claimed that we erroneously placed the burden of proof on it to show the existence of an underlying notice. *See Zeigler Coal Co.*, 4 IBMA 88, 82 I.D. 111, 1974–1975 OSHD par. 19,478 (1975). MESA has also argued that we were in error in holding that the subject violation could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard. As to the latter, it suffices to point out that this entire case has been litigated on the theory that the subject violation did not pose such a "hazard." Indeed MESA explicitly conceded as much in its initial appellate brief. Br. of MESA, p. 14, n. 2.

B. Whether the Board erred in holding that the requirement stated in the phrase "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" is a prerequisite to the issuance of a withdrawal order pursuant to section 104(c)(1) of the Act.

III.

Discussion

A.

In challenging our holding that Zeigler was *not* jurisdictionally barred from claiming that the subject 104(c)(1) withdrawal order was invalid on the ground of a lack of an underlying notice of violation, MESA argues that Zeigler could only have attacked the validity of the notice by filing an Application for Review of such notice within thirty days of its issuance. Although MESA acknowledges that section 105, the administrative review provision of the Act, does not literally support its position, it contends nevertheless that the congressional failure to so provide was merely legislative oversight. MESA asks us to imply into section 105 any necessary words or phrases to support MESA's position in the interest of effectuating the supposed legislative intent. We are told that if we hold for MESA in this matter we will be doing no violence to the plain meaning of section 105, and we are in effect warned that the failure to so hold will create a conflict between section 104(c)(1) and the Due Process Clause of the Fifth Amendment to the Constitution. Br. of MESA on reconsideration, p. 3.

At the outset, we note that Zeigler did not attack the validity of the subject notice of violation. Rather, the company denied that such notice had ever been issued. If we were to reverse ourselves on the narrow holding of this case, we would be in the absurd position of saying that an applicant for review is precluded from denying the issuance of an underlying notice of violation in a proceeding to review a related 104(c)(1) withdrawal order because the applicant failed to make that assertion at a time when it claims to have been in ignorance of such notice. Even if we now agreed to set aside our previous dicta with respect to the review jurisdiction of the Secretary over challenges to the *validity* of notices of violation issued pursuant to section 104(c)(1), we would have to reaffirm our initial holding in order to avoid an otherwise untenable and wholly capricious result. Thus, we remain committed to the proposition that an applicant for review may challenge the validity of a 104(c)(1) withdrawal order on the ground that it is not supported by a pre-existing notice of violation containing findings pursuant to section 104(c)(1).

[1] We turn now to MESA's objections to the soundness of our dictum that an applicant for review may only challenge the validity of a notice of violation issued pur-

suant to section 104(c)(1) as an incident of the review of a related (c)(1) withdrawal order. It is really the dictum, rather than the narrow holding on the jurisdictional issue, to which MESA has directed its arguments in this phase of the reconsideration.

In attacking our previously stated views, MESA contends that the kind of notice of violation now before the Board is properly described as a section 104(b) notice with 104(c)(1) findings. Previously, we have referred to such citations as 104(c)(1) notices. *See Eastern Associated Coal Corp.*, 3 IBMA 331, 81 I.D. 567, 1974–1975 OSHD par. 18,706 (1974).[3]

Inasmuch as section 104(c)(1) does not, in so many words, direct the issuance of a notice of violation, we accept MESA's characterization of such notices as an alternative description. The impact of this modification of viewpoint is, however, minimal. All that such acceptance implies is that an applicant for review under section 105(a) of the Act may challenge a 104(b) notice with (c)(1) findings with respect to the reasonableness of time fixed for abatement. 30 U.S.C. § 815(a) (1970); *Freeman Coal Mining Company*, 1 IBMA 1, 77 I.D. 149, 1971–1973 OSHD par. 15,367 (1970); *Reliable Coal Corporation*, 1 IBMA 50, 78 I.D. 199, 1971–1973 OSHD par. 15,368 (1971).

Such conclusion does not commit us to agreeing with MESA's further contention that an operator may challenge the validity of a 104(b) notice with (c)(1) findings, in advance of the issuance of a related 104(c)(1) withdrawal order, where the violation cited therein has been abated. If we were to accept that contention, we would have to do more than simply insert words or phrases, as MESA suggests; we would be obliged to ignore the plainly stated limitation of review of notices of violation under section 105 to issues bearing on the reasonableness of time fixed for abatement. *See Reliable Coal Corp., supra.* As we have indicated before, proper respect for legislative authority and the separation of powers dictate that we reject so-called interpretations which are in reality *de facto* amendments to the Act. *See Eastern Associated Coal Corp.*, 4 IBMA 1, 82, I.D. 22, 1974–1975 OSHD par. 19,224 (1975);[4] *cf. United States Fuel Co.*, 2 IBMA 315, 321, 80 I.D. 739, 1973–1974 OSHD par. 16,954 (1973). Since we believe that ignoring the statutory limitation on the scope of review of notices of violation would indeed amount to a *de facto* amendment, we reject such interpretation.

Before closing this phase of our reconsideration, a word or two is in order with regard to MESA's rationale for interpreting section 105

[3] This decision has been reaffirmed by the Board upon reconsideration. 3 IBMA 383, 81 I.D. 627, 1974–1975 OSHD par. —— (1974).

[4] An appeal of the Board's decision in this case is pending in the United States Court of Appeals for the District of Columbia Circuit. No. 75-1107.

(a) in the manner that it has urged on us. MESA contends in substance that denial of the opportunity for prompt review of a 104(b) notice with (c)(1) findings, where the violation is abated in advance of the issuance of a related 104(c)(1) withdrawal order, would render such order unconstitutional, there having been no opportunity for prior hearing.[5] According to MESA, the Due Process Clause of the Fifth Amendment to the Constitution requires such hearings in instances where there is no "imminent peril." Br. of MESA on reconsideration, p. 2.

We have not undertaken to determine the validity of MESA's constitutional argument because, as an administrative tribunal within the Executive Branch, the Board is not possessed of the "judicial power of the United States" under Article III of the Constitution and has no jurisdiction to make any adjudicative determination as to the extent of congressional power to authorize a deprivation of property without opportunity for prior hearing.[6] *See*, however, *Ewing* v. *Mytinger and Casselberry*, 339 U.S. 594 (1950).[7]

To sum up: we are reaffirming our initial holding. In a section 105 proceeding to review a section 104(c)(1) withdrawal order, there is no jurisdictional bar to a claim that such withdrawal order is invalid for a lack of any underlying notice of violation. With respect to the scope of review of a section 104(b) notice with (c)(1) findings under section 105, the Board is of the view that, so long as the violation cited in such notice remains unabated, an operator may file an Application for Review to contest the reasonableness of time fixed for abatement. Once the violation is abated and in advance of the issuance of a related (c)(1) withdrawal order, there is no right under section 105(a) for *administrative* review. Such notice, although abated, may be reviewed under section 105(a) of the Act, but only as an incident to the determination of validity of a related section 104(c)(1) withdrawal order.

B.

We come now to the major substantive question presented on reconsideration. MESA, supported by the UMWA, contends that the Board erred in holding that the express requirement for a section 104(c)(1) notice stated in the phrase "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" is an implied prerequisite in the violation giving rise to the issuance of a section 104(c)(1) withdrawal order. Zeigler and

[5] *See Zeigler Coal Co., supra*, 3 IBMA at 455, 81 I.D. 732 (1974), n. 4. *See also* 5 U.S.C. §§ 701–706 (1970) and *Capital Coal Sales* v. *Mitchell*, 164 F. Supp. 161 (D.C. D.C. 1958), *aff'd.* 282 F. 2d 486 (D.C. Cir. 1960).

[6] *See United States* v. *Nixon*, 418 U.S. 683, 94 S. Ct. 3090, 3106 (1974); *Public Utilities Comm'n. of California* v. *United States*, 355 U.S. 534, 539–40 (1958); *Panitz* v. *District of Columbia*, 112 F.2d 39 (D.C. Cir 1940).

[7] *Compare Fuentes* v. *Shevin*, 407 U.S. 67, 90–92, notes 27, 28 (1972) *with Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S. Ct. 1895, 1902 (1974).

BCOA support the Board's original conclusion.[8]

For the respective reasons stated in their briefs, MESA and the UMWA would have us conclude that the elements of proof subject to dispute in a proceeding to review a section 104(c)(1) withdrawal order, apart from a valid underlying notice of violation, are only those which are expressly stated in the Act. Those elements are: (1) that the condition or practice found by the inspector constitutes a violation of a mandatory health or safety standard, and (2) that such violation was the result of an unwarrantable failure to comply with such legislated standard of care.[9]

When we first dealt with this section of the Act [10] in *Eastern Associated Coal Corp.*, *supra* (cited at 147), we faced a challenge to a section 104(c)(2) withdrawal order *by an operator* who, like MESA and the UMWA in the instant case, contended that the prerequisite elements of proof for a withdrawal order under section 104(c) were only those expressly stated in the Act, namely, the existence of a violation and unwarrantable failure. After examining the literal language of this section, we concluded preliminarily that the statutory phrases contained a number of serious ambiguities, and further, that the subsections of section 104(c) provided for a sequence of

[8] BCOA argues that, unless we reaffirm the result reached in our initial decision and reject the statutory construction theory advanced by MESA and the UMWA, we will render section 104(c) unconstitutional. We have not undertaken to resolve this constitutional argument because, for the reasons stated earlier, we think that its resolution is beyond our authority. *See* n. 6, *supra*.

[9] We observe in passing that MESA's view of the extent of congressional power to authorize a taking of property without prior hearing undercuts its argument with respect to the criteria of validity for a section 104(c)(1) withdrawal order and amounts to an implied concession that section 104(c) is invalid.

[10] Section 104(c) of the Act provides as follows:

"(c)(1) If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (d) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

"(2) If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) of this subsection until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) of this subsection shall again be applicable to that mine."

events which were inextricably linked together. Based on these initial conclusions, we decided to construe section 104(c) as a whole and to infer its true meaning from its intended purposes and its place in the overall enforcement scheme, bearing in mind that we must stay within the available leeway of the statutory language. 3 IBMA at 347. We ultimately held that, in addition to proof of any underlying notice or orders, as the case may require, the prerequisites to a valid withdrawal order under section 104(c) are as follows: (1) that there is proof of a violation; (2) that such violation did not cause an imminent danger; (3) that such violation could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard; and (4) that such violation was caused by an unwarrantable failure to comply. Although the first and fourth prerequisites only are mentioned with respect to section 104(c) withdrawal orders, we reasoned that the Congress intended that the second and third, which are expressly mentioned with respect to the underlying notice, be carried forward by implication and applied to the related withdrawal orders. Furthermore, in applying these criteria, we concluded: (1) that unwarrantable failure is a standard of fault which encompasses intentional, knowing, or reckless deviations from the mandatory standards of care;[11] and (2) that the clause "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" was a phrase of art and referred to violations posing a probable risk of serious bodily harm or death. 3 IBMA at 356. Lastly, we rejected the theory that the violations in a given 104(c) sequence must be substantively similar to each other in kind. 3 IBMA at 352.[12]

In attacking the result that we reached in our initial consideration of this appeal, the lines of argument pursued by the UMWA and MESA, respectively, vary somewhat.

The UMWA attacks the underlying basis for the reasoning and conclusions set forth in *Eastern Associated Coal Corp.*, *supra*, and applied to the case at hand. The UMWA argues that section 104(c), and in particular subsection (c)(1), is such a model of clarity that there is no room for an extended exercise in statutory construction.

Although MESA agrees with the literalist position taken by the UMWA, it buttresses its viewpoint with arguments based on the legislative history. MESA submits in substance that a comparison between section 104(c) of the Act and the pertinent 1966 amendments to the

[11] As we noted above, we did not reach the merits in this case of the question as to whether the subject violation was caused by an unwarrantable failure to comply.

[12] Substantive recidivism, that is repeated violation of the same mandatory standard, is reflected in penalty assessments because, under section 109, the Secretary must take previous history of violations into account. Deterrence of such repeated misbehavior under section 104(c) is at most a lesser included enforcement objective provided that the other criteria of validity are satisfied.

Federal Coal Mine Safety Act of 1952 supports the conclusion that violations which could *not* significantly and substantially contribute to the cause and effect of a mine safety or health hazard may be the subject of a 104(c)(1) withdrawal order. MESA also draws support from a comparison between the Senate bill and the House version of section 104(c) which ultimately became the law, as well as from statements contained in committee reports. Br. of MESA on reconsideration, pp. 10–13.

We turn initially to the UMWA's argument. Having re-examined the literal words of section 104(c), we still find that they are ambiguous and inconclusive in a number of vital respects which the Union has glossed over.

First, there is the phrase "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *," which is at the crux of the present dispute. If we were to give each of the words of that clause an ordinary meaning, it would become a superfluous truism; by definition, the violation of any mandatory standard could significantly and substantially contribute to the cause and effect of a mine safety or health hazard. However, since it is plain that the Congress intended by these words to enact one of several discriminating criteria designed to separate those violations that merit 104(c) treatment from those that do not, such a literal interpretation would be squarely at odds with the apparent congressional intent. Such interpretation would render the phrase nugatory when the Board is obliged under the usual norms of statutory construction to give meaning to all the terms of a statute. Sutherland, *Statutes and Statutory Construction*, § 46.06 (4th ed. 1973).

Second, there is the meaning of the term "unwarrantable failure to comply." The Congress pointedly omitted any binding definition of this term in its list of statutory definitions embodied in section 2 of the Act, thus leaving the resolution of its meaning to case-by-case adjudication by the Secretary, with only the scantiest guidance in the legislative history. *See* 30 U.S.C. § 802 (1970); *Eastern Associated Coal Corp., supra*, 3 IBMA at 355–6.

Then too, there is the question of the proper interpretation of the "similarity" requirement of section 104(c)(2). In its brief, the UMWA asserts: "A 'similar violation' is obviously any violation of a mandatory health or safety standard which, like *a violation* which results in the issuance of a section 104(c)(1) withdrawal order, is 'caused by an unwarrantable failure.' " [Italics added.] The pertinent statutory clause reads as follows:

> If a withdrawal order with respect to any area in a mine has been issued pursuant to paragraph (1) of this subsection, a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to *those* that resulted in the issuance of the withdrawal order under paragraph (1) * * *. [Italics added.]

A comparison of the UMWA's paraphrase and the actual language of the Act reveals that the Union has failed to note the use of a plural pronoun, namely, "those." The (c)(2) violation must be similar to "*those*" violations which gave rise to a (c)(1) withdrawal order, and not just similar to *the* violation cited in the (c)(1) order. Literally speaking, the violation cited in the underlying 104(c)(1) notice does give rise to the related (c)(1) withdrawal order and we have no choice other than to conclude that a (c)(2) violation must be similar to that violation as well. The ambiguity created by this vague plural pronoun is that although it suggests that there is an easily identifiable nucleus of common characteristics, when one looks to subsection (c)(1), it is not at all clear of what that nucleus consists. In strictly literal terms, there are two characteristics that are expressly mentioned with respect to (c)(1) notices of violation but omitted in the provision for a related withdrawal order. It is not certain whether the Congress intended that the nucleus of common characteristics includes only those that are expressly mentioned with regard to the withdrawal order as well as the notice, or if the legislators intended that this nucleus include all the characteristics mentioned in the provision for a notice of violation, the disputed ones being carried forward by implication. The language of section 104(c) on its face provides no apparent resolution to this problem.

Although we could go further and belabor the point, the ambiguities already pointed out suffice to show that the literal words are inconclusive on key points as to what Congress intended. Thus, out of necessity, we have been obliged to construe the provisions of section 104(c) with an eye to the overall legislative enforcement policy, an approach which we would take in any event.

We come then to MESA's arguments based on the legislative history.

With respect to the comparisons drawn by MESA between the language of section 104(c) and the 1966 amendments to the Federal Coal Mine Safety Act of 1952, we stated the following in our initial opinion, 3 IBMA at 461, 81 I.D. 735, n. 10:

> * * * We have found particularly unpersuasive comparisons of section 104(c) to portions of statutory ancestors of the Act since the Congress took the trouble to repeal them *in toto* rather than to amend. 83 Stat. 803 (1969).

MESA has shown no reason to cause us to change our viewpoint and we reaffirm it.

With respect to comparisons drawn from language of committee reports and the Senate and House versions of section 104(c), we previously indicated that the products of such analysis were unilluminating. *Zeigler*, *supra*, 3 IBMA at 461, 81 I.D. 735, n. 10. Indeed MESA in its brief at page 14 after extensively quoting from inconsistent events noted in the legislative history concluded in part:

Neither the 1966 Amendment nor all the bills introduced in the development of the 1969 Act give much historical basis, above and beyond its plain meaning, for the language ultimately derived as the 104(c) unwarrantable failure provisions * * *.

Thus, it seems to us now, as it did before, that the meaning of the phrase "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *," as well as the question of whether that phrase and the requirement of a finding of no imminent danger are implied criteria of the validity of a 104(c)(1) or (2) withdrawal order, can best be determined by looking to the purposes of section 104(c) in the overall enforcement policy mandated by the Congress.

In *Eastern Associated Coal Corp., supra*, we analyzed at length the overall enforcement scheme and came to the general conclusion that the legislative policy was a blend of measured deterrence and protective reaction for the safety of affected miners, with each enforcement tool directed toward a particular class of conditions or practices. 3 IBMA at 348–351. More specifically, we concluded that section 104(c), involving as it does, ongoing liability to further withdrawal orders, contains the sharpest of the enforcement tools provided to the Secretary and accordingly should be applied in situations calling for vigorous protective reaction and maximum deterrence.

Against this background and in order to give effect to all the statutory terms, we held and still believe that the clause "* * * could significantly and substantially contribute to the cause and effect of a mine safety or health hazard * * *" is a phrase of art. The key word of that clause is "hazard" which in our view refers not to just any violation, but rather to violations posing a risk of serious bodily harm or death. The part of the clause which reads "* * * could significantly and substantially contribute to the cause and effect * * *" states a probability requirement, designed in our opinion, to prevent application of section 104(c) to largely speculative "hazards." Neither MESA nor the UMWA has offered any reasonable alternative construction of this clause which would give it the discriminating effect that the Congress intended.

As a further consequence of our analysis of the congressional policy, we were compelled to imply the gravity requirement stated in the clause just discussed, as well as the requirement of a finding of no imminent danger, into the portions of section 104(c) which deal with withdrawal orders. We did so out of a desire to avoid absurd or anomalous results.

Although MESA is silent with respect to the absurdities that we spoke of in *Eastern Associated Coal Corp., supra*, the UMWA in its brief and at oral argument upon reconsideration denied that any such problems would occur as a result of adopting its interpretation of the Act, that is, that the prerequisites of

a valid section 104(c) (1) or (2) withdrawal order are only: (1) violation of a mandatory health or safety standard, and (2) unwarrantable failure to comply. Therefore, we deem it appropriate to point out in plain terms the likely problem areas.

In the case at hand, the violation cited in the subject withdrawal order was conceded to be a relatively insignificant accumulation of combustible materials, that is to say, such accumulation did not pose a probable risk of serious bodily harm or death. Let us suppose *arguendo*, that there was a valid underlying notice of violation based upon a roof control violation, and further, that there was a subsequent 104(c)(2) withdrawal order citing the lack of an adequate number of sanitary toilet facilities. 30 CFR 71.500. Under the theory advanced by the UMWA and MESA, all that would be necessary to sustain the validity of the withdrawal orders would be proof of unwarrantable failure. Since unwarrantable failure is simply a standard of fault, these violations could conceivably be comparatively nonserious. If such were the case, then under the theory advanced by MESA and the UMWA, we would have to conclude that the notice of violation had issued validly for a violation posing probable risk of serious bodily harm or death, and that the withdrawal orders, with all their potential for ongoing liability, had issued validly for violations, neither of which posed such a compelling risk to the miners. Moreover, it is quite likely that in subsequent civil penalty proceedings under section 109 of the Act, a larger penalty would be assessed for the violation cited in the (c)(1) notice than for the substantiively unrelated violations cited in the withdrawal orders. Thus, lesser statutory sanctions would be imposed for the most threatening of these deviations from the mandatory standards, while more imposing sanctions would be applied to objectively lesser infractions. Such results would be squarely at odds with the congressional enforcement strategy which calls for a graduated response to operator misbehavior. They would also add a punitive element which we think Congress reserved for criminal sanctions. *See* 30 U.S.C. § 819(b) (1970).

Then too, if we were to adopt the literalist construction, we would thereby thrust upon federal coal mine inspectors unbounded discretion to decide whether to issue 104(a) imminent danger or 104(c) unwarrantable failure withdrawal orders in certain circumstances. The former may be issued irrespective of fault, and under the literalist theory, the latter could be issued irrespective of imminent danger because, so it is argued, the requirement of a finding of *no imminent* danger, expressly applicable to 104(c)(1) notices, is not impliedly applicable to 104(c) withdrawal orders. Thus, in an instance of imminent danger which coincidentally

was the result of a violation caused by an unwarrantable failure, an inspector would be totally at large in determining whether to issue a 104(a) order or a 104(c) order. While the immediate result would be largely identical, namely, withdrawal of persons from affected areas, the principal difference would be in the ongoing liability to further withdrawal orders which is part and parcel of a 104(c) withdrawal order. Whatever the inspector's decision, it would be arbitrary, and given the diversity of human behavior, inspectors would issue differing orders with respect to factual situations which are not significantly distinguishable.

The lack of consistency of application and the arbitrary character of such important determinations by inspectors pose severe, possibly intractable problems of law and policy. As a matter of law, the federal courts would be forced to deal with serious due process objections. As a matter of policy, the ongoing effort of the Secretary through his delegates to achieve the congressional objective of inducing greatly improved standards of care in the nation's underground coal mines would be compromised in several ways. On the one hand, inconsistent and capricious enforcement practices are bound to penalize all operators at one time or another. On the other, indiscriminate application of maximum deterrent force is bound to dull the galvanizing shock of this unique species of withdrawal order which disrupts mining activities *and* threatens further such disruption, as well as initiates the civil penalty process which goes forward in the case of any violation of the mandatory standards.

In sum, having fully reconsidered our previously articulated position on the proper interpretation of section 104(c) and the conclusions reached in our initial opinion in this case, we find no merit in the arguments presented by the petitioner MESA or the UMWA. It is therefore the judgment of the Board that its decision in this case should be reaffirmed as embodying a reasonable and workable construction of section 104(c).

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision of the Board in the above-captioned docket upon reconsideration IS REAFFIRMED.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

JAMES R. RICHARDS,
Ex-Officio Member of the Board,
Director,
Office of Hearings and Appeals.

KENTLAND-ELKHORN COAL CORPORATION

4 IBMA 166

Decided *May 14, 1975*

Appeal of Mining Enforcement and Safety Administration (MESA) from a decision by Administrative Law Judge Edmund M. Sweeney (Docket No. NORT 71-121), dated April 19, 1974, vacating a section 104(c)(2) Order of Withdrawal pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969,[1] hereinafter "the Act."

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Generally

The validity of the precedent Notice and Orders is not in issue in a proceeding for review of an Order of Withdrawal issued pursuant to section 104(c)(2) of the Act.

2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Admissibility of Evidence

The precedent Notice and Orders underlying a section 104(c)(2) Order of Withdrawal are admissible in evidence to establish their existence in the section 104(c) chain as part of *prima facie* case.

3. Federal Coal Mine Health and Safety Act of 1969: Hearings: Burden of Proof

Where MESA, in a review proceeding of a section 104(c)(2) Order of Withdrawal, fails to establish a *prima facie* case that the Order was validly issued pursuant to section 104(c) of the Act, the operator has no burden to present rebuttal evidence and is entitled to the relief requested.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and Madison McCulloch, Esq., Trial Attorney for appellant, Mining Enforcement and Safety Administration. Kentland-Elkhorn Coal Corporation did not participate in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On October 28, 1970, a federal coal mine inspector conducted an inspection of the Kentland-Elkhorn Coal Corporation (Kentland-Elkhorn) No. 3 Mine, during which he issued a Notice of Violation pursuant to section 104(c)(1) of the Act alleging a violation of section 304(a) of the Act. On November 24, 1970, the same inspector, during a subsequent inspection, issued a section 104(c)(1) Order of Withdrawal alleging another violation of section 304(a) of the Act. On March 22, 1971, this inspector, during another inspection, issued a section 104(c)(2) Order of Withdrawal alleging a violation of 30 CFR 75.400 (section 304(a) of the Act). Finally, on May 4, 1971, this inspector issued a section 104(c)(2) Order of Withdrawal alleging a violation of 30 CFR 75.603 in that there were three temporary splices in the trailing cable of a roof-bolt-

[1] 30 U.S.C. §§ 801-960 (1970).

ing machine, one of which was outby the strain clamp.

Kentland-Elkhorn filed a timely Application for Review of the May 4, 1971 Order of Withdrawal, but did not at any time file for review of the precedent Notice or the other two Orders.

At a prehearing conference, both parties stipulated that the condition cited in the May 4, 1971 Order did exist at the time of issuance of the Order, but did not stipulate as to whether the requirements of section 104(c) (1) and (2) were met. At an evidentiary hearing held on July 24, 1973, the Administrative Law Judge (Judge) rejected the Mining Enforcement and Safety Administration's (MESA) motion that the October 28, 1970 Notice, and the November 24, 1970 and March 22, 1971 Orders be admitted into evidence as proof of the violations alleged therein. Counsel for MESA offered no other evidence, save the May 4, 1971 section 104(c) (2) Order involved, and no testimony due to the fact that the inspector who issued the Order was not and probably would not be available to testify. At this point the hearing was concluded.

In his decision, issued April 19, 1974, the Judge held that to establish the validity of the Order in issue, MESA must show: "1 * * * a lawful withdrawal order had been issued under section 104(c) (1); and 2—that the violation here was similar to that set out in the 104(c) (1) order." He held that MESA "has the burden of proving, by a preponderance of the evidence, that the elements comprising said Order constituted a violation of the Act or of the Regulations justifying the use of section 104(c) (2)." The Judge concluded that MESA's proffer of evidence and Kentland-Elkhorn's stipulation as to the condition cited did not meet this burden and that the 104(c) (2) Order of Withdrawal in issue therefore must be vacated.

In its brief on appeal, MESA contends that the operator in a section 105 proceeding has the burden of proving all save that the condition cited in the Order constituted a violation of a mandatory health or safety standard. No reply brief was filed on behalf of Kentland-Elkhorn.

Issues Presented

A. Whether the Judge erred in rejecting MESA's proffer of the underlying section 104(c) Notice of Violation and Orders of Withdrawal as proof of the violations alleged therein and as proof of the existence of a section 104(c) chain of citations.

B. Whether the existence of the section 104(c) chain of citations, unwarrantable failure, lack of imminent danger, and a violation which could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, in addition to proof of violation of a mandatory health or safety standard, must be established by MESA in a proceeding held pursuant to section 105 of the Act to

review a section 104(c)(2) Order of Withdrawal.

Discussion

A.

Until the prehearing conference in the instant case, Kentland-Elkhorn had not contested either the validity of the issuance or the truth of the allegations contained in the underlying Notice and Orders; it did not apply for review of them and has never denied that the conditions cited therein existed. However, Kentland-Elkhorn took the position that the underlying Notice and Orders were inadmissible unless the allegations therein were proved by MESA.

In *Eastern Associated Coal Corporation*, 3 IBMA 331, 354, 81 I.D. 567, 577, 1974–1975 OSHD par. 18,706 (1974), this Board observed:

> Inasmuch as Eastern did not timely challenge the instant underlying citations, and does not deny the violations, we presume their validity * * *.

[1] Although Kentland-Elkhorn contended that the validity of the underlying Notice and Orders was in issue, even though review was never sought, we believe that, consonant with *Eastern*, *supra*, failure by Kentland-Elkhorn to seek timely review of the Notice and Orders, precludes their review in this proceeding.

The validity of any section 104(c) order may be reviewed, but only if such review is timely sought pursuant to section 105(a)(1) of the Act. We recognized in *Zeigler Coal Corporation*, 1 IBMA 71, 78 I.D. 362, 1971–1973 OSHD par. 15,371 (1971), that, by seeking timely review of a section 104(c)(1) order, an operator, if successful, might obtain relief from the possible subsequent issuance of a section 104(c)(2) order. Although we held in *Zeigler Coal Company*, 3 IBMA 448, 81 I.D. 729, 1974–1975 OSHD par. 19,131 (1974), *aff'd on reconsideration*, 4 IBMA 139, 82 I.D. 221, 1974–1975 OSHD par. 19,638 (1975) that in a proceeding to review the validity of a section 104(c)(1) Order of Withdrawal, the *validity* of the underlying section 104(c)(1) Notice of Violation may be put in issue if properly challenged, in the instant case, Kentland-Elkhorn elected not to seek review of the section 104(c)(1) Order issued to it, and, thus, will not now be heard to challenge either that Order or the underlying section 104(c)(1) Notice. Hence, where timely review is not sought, an operator must be held to have waived such review and cannot be heard to the contrary in a proceeding to review a subsequent section 104(c)(2) order.

[2] Since the Board concludes that the *validity* of the underlying Notice and Orders may not be challenged in the instant case, their admission in evidence would serve only to establish their *existence* as an underlying part of the section 104(c) chain. In its Application for Review and Demand for Public Hearing, Kentland-Elkhorn challenged these underlying citations as "* * * issued arbitrarily,

unjustly, and without legal basis or foundation in law * * * ." At no time in this proceeding did Kentland-Elkhorn challenge the *existence* of the underlying citations. In fact, by challenging their validity, it is admitting their existence. Accordingly, it was unnecessary for MESA to offer them as evidence since the only fact needed, *i.e.*, their existence, was admitted by Kentland-Elkhorn. To establish the invalidity of the Order in issue, the underlying Notices and Orders are clearly admissible as proof of their existence. However, in the instant case, the rejection of these documents by the Judge was harmless error since they were irrelevant to a disposition of the case.

B.

[3] In *Zeigler Coal Company*, 4 IBMA 88, 101, 82 I.D. 111, 1974–1975 OSHD par. 19,478 (1975), the Board stated that MESA has the obligation of making out a *prima facie* case in a section 105 proceeding that an order or notice was validly issued and, if MESA does so, the operator must then rebut this case by a preponderance of the evidence if it is to prevail. In the instant case, MESA must make out a *prima facie* case that the Order in issue was validly issued pursuant to section 104(c)(2) of the Act. Although, as we held above, MESA need not establish the validity of the underlying section 104(c) Notices and Orders, it must establish a *prima facie* case with respect to the section 104(c) chain of citations, the fact of violation, unwarrantable failure, and the other requirements for issuance of a section 104(c)(2) order. Although the fact of violation of 30 CFR 75.603 was admitted by Kentland-Elkhorn when it stipulated to the condition cited in the Order and the existence of the section 104(c) chain was established, MESA could not produce the inspector who issued the Order, and expressly elected to offer no other evidence than the Order itself. Since the Order contains nothing observed by the inspector save the condition cited and no reasons as to why he believed it was the result of unwarrantable failure or its relevance to the other requirements of section 104(c), we find that MESA has not established a *prima facie* case that the Order in issue was validly issued pursuant to section 104(c)(2) of the Act. Accordingly, we conclude that Kentland-Elkhorn is entitled to the relief requested.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in the above-captioned case IS AFFIRMED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

APPEAL OF THE MINNESOTA CHIPPEWA TRIBE

IBCA–1025–3–74

Decided *May 19, 1975*

Contract No. 407–80(1), Construction of the Ball Club Housing Streets, Leech Lake Indian Reservation, Cass Lake, Minnesota, Bureau of Indian Affairs.

Denied.

1. Contracts: Performance or Default: Compensable Delays

The Government did not cause any compensable delay in the commencement of the work when the Government issued the notice to proceed as soon as the performance and payment bonds required by the contract were received.

2. Contracts: Construction and Operation: General Rules of Construction

A federal contract is governed by federal contract law, rather than the law of the state in which the contract is executed.

3. Contracts: Construction and Operation: General Rules of Construction

Article 2 of the Uniform Commercial Code is applicable to transactions in goods, not to construction contracts.

4. Contracts: Construction and Operation: Changes and Extras

A rise in the cost of materials after a fixed price construction contract is executed is not a change within the changes clause of the contract.

APPEARANCES: Mr. Kent P. Tupper, Peterson, Tupper & Smith, Attorneys at Law, Walker, Minnesota, for the appellant; Mr. Elmer T. Nitzschke, Department Counsel, Twin Cities, Minnesota, for the Government.

OPINION BY ADMINISTRATIVE JUDGE VASILOFF

INTERIOR BOARD OF CONTRACT APPEALS

Findings of Fact

This was a fixed price contract for the furnishing of all labor, equipment and materials and performing all work for the grading, drainage, concrete curb and gutter, bituminous surfacing and storm drain system of .723 miles of streets within the Leech Lake Indian Reservation in Itasca County, Minnesota. In the amount of $102,066.45 and awarded to the appellant on June 26, 1973, the contract contained the General Provisions for construction contracts set forth in Standard Form 23–A (October 1969 Edition). Work was required to commence within 15 calendar days after date of receipt of notice to proceed (Appeal File Ex. 6).[1]

After finishing most of the work and while in the process of placing sod the appellant was notified to suspend the work due to the cold weather on November 3, 1973, and to complete the work the following spring when weather conditions permitted (Ex. 11).

Appellant wrote the Government on November 19, 1973, requesting a cost increase for two items: bituminous material for mixture, AC–1 and wearing coarse mixture, BA–2 (Ex. 14). The unit prices for the two items were $40 and $7.50 per

[1] All references herein to exhibits refer to exhibits in the appeal file.

ton, respectively (Ex. 4). The prices sought were $47 and $11 per ton, respectively, for a total of $16,448.60. In its November 19, 1973, letter the appellant stated that its bid on these two items had been based on a quotation received from the Komatz Construction Company. This company was resurfacing a highway nearby and had a bituminous plant in the area. The appellant further alleged that due to delays in starting this contract and scheduling problems the Komatz Construction Company moved out of the area and apparently took its bituminous plant with it. Because its source of bituminous material had moved, appellant had to make other arrangements to obtain the necessary material to perform the work. As the appellant states in its letter, "we were faced with an oil shortage, price increases and larger hauling distances which resulted in a higher cost figure for the above items."

During the week ending October 27, 1973, the appellant's subcontractor completed the bituminous surfacing (Ex. 11).

In reply to the appellant's request for a cost increase the contracting officer issued his final decision on February 6, 1974, denying the claim in its entirety (Ex. 18). In his decision the contracting officer explained that for an increase in costs to be allowed it would have to come within clauses 3 or 4 of the General Provisions as an equitable adjustment. In his view the request for the increased costs did not constitute either a change or a differing site condition. The appellant timely appealed the contracting officer's decision denying the claims.

Neither party made a timely request for an oral hearing. Acting under its rules the Board entered an Order on September 5, 1974, settling the record, which provided that the appeal was to be deemed submitted for the decision on the record supplemented by such additional exhibits as the parties should furnish by October 7, 1974. A complaint, answer and briefs have been filed by the parties.

In its complaint the appellant raises the issue of the Arab-Israeli war and the resulting increase in the price of oil and asphalt. It requests that the Board take judicial notice that the war was an unforeseen contingency altering the nature of the performance of the contract. Contending that the contract had been made impractical and become burdensome, the appellant vigorously argues that it is entitled to relief under the provision of the Uniform Commercial Code as contained in Minnesota Statutes Annotated § 336.2–615. Since the contract was executed in the State of Minnesota, appellant asks that the Board be governed by Minnesota law.

Decision

[1] In the claim letter of November 19, 1973, and its appeal letter of March 7, 1974 (Ex. 19), the appellant asserts that the Government's delay in issuing the notice to

proceed had the effect of delaying performance by at least 30 days.[2] The contract was executed on June 26, 1973, and appellant was notified to commence work on July 24, 1973 (Ex. 9). The contract as awarded required the contractor to furnish performance and payment bonds (Ex. 1). During a preconstruction conference on July 6, 1973, discussions were held about the appellant procuring the required bonds (Ex. 10). Only on July 24, 1973, did the Government receive the bonds. It notified the appellant to proceed on the same date. Consequently, there is no basis for concluding that the Government is responsible for the appellant's delay in commencing work on this contract. See *Coac, Inc.*, IBCA–1004–9–73, 81 I.D. 700; 74–2 BCA par. 10,982 (1974).

The Board takes official notice that the Arab-Israeli war took place in 1973 in the Middle East. Since there is no evidence before this Board on the question of the prices the appellant contemplated paying for oil and asphalt or of the prices it did in fact pay, the Board expresses no opinion on whether the contemplated cost to the appellant was increased due to the war. In the absence of any evidence on costs, it is possible that appellant merely failed to make as much profit as it anticipated. However, since the appellant in its prayer for relief in its complaint has asked that, in the alternative, this Board remand the appeal to the contracting officer so both parties may establish the increased cost, the Board will treat this appeal as one involving entitlement only.

The basic issue is whether a rise in costs after a fixed price construction contract is executed entitles a contractor to an equitable adjustment for any additional costs it had to pay over its expected costs.

[2] Before the Board addresses this issue it is necessary to determine whether Minnesota law is applicable and thus the Minnesota Uniform Commercial Code. Appellant's position is that since the contract was executed in Minnesota the law of Minnesota applies. The law is otherwise. When a federal contract is involved federal law governs. *Clearfield Trust Co.* v. *U.S.*, 318 U.S. 363 (1943); *U.S.* v. *Allegheny County*, 322 U.S. 174 (1944); *Harrod & Williams, Inc.*, ASBCA No. 17714 (March 29, 1973), 73–1 BCA par. 9994; *Quiller Construction Company, Inc.*, ASBCA No. 14963 (February 16, 1972), 72–1 BCA par. 9322; *Meeks Transfer Company, Inc.*, ASBCA No. 11819 (August 31, 1967), 67–2 BCA par. 6567; *Federal Pacific Electric Co.*, IBCA No. 334 (October 23, 1964), 1964 BCA par. 4494; *Flight Test Engineering Co.*, ASBCA No. 7661 (November 19, 1962), 1962 BCA par. 3606.

[3] In any event, resort to the Uniform Commercial Code would be of no avail. Appellant seeks to apply Minnesota Statutes Annotated § 336.2–615 which is a part of

[2] This issue may have been abandoned as it is not mentioned in either the appellant's complaint or brief.

article 2 of the Uniform Commercial Code. It is provided by Minnesota Statutes Annotated § 336.2–102 that Article 2 is applicable only to transactions in goods. Under the construction contract involved in this appeal, appellant is to provide sufficient labor, equipment and materials to surface a street with a bituminous covering. This is not a contract to furnish goods to the Government and therefore appellant's reliance upon the UCC is misplaced. *General Maintenance & Engineering Company*, ASBCA No. that Article 2 is applicable only to 14691 (October 14, 1971), 71–2 BCA par. 9124. *See also* 1 *Anderson UCC* §§ 2–102:5, 2–105:10, 2–105:11.

[4] Turning now to the issue of whether a rise in costs after a fixed price construction contract has been executed entitles the appellant to an equitable adjustment for any additional costs it had to pay over its expected costs, the Board finds that the answer is in the negative.

The purpose of a fixed price construction contract is to provide for the services at a pre-determined price. If there is an inflationary rise in costs the contractor assumes such risk absent any special contract provisions under which the risk is otherwise allocated. In this instance the appellant performed pursuant to the contract with appellant's subcontractor completing the required bituminous work on October 27, 1973. This is not a case where the appellant could not obtain the necessary bituminous material such as was the situation in *Automated Extruding & Packaging, Inc.*, GSBCA No. 4036 (November 13, 1974), 74–2 BCA par. 10,949; *rehearing denied*, 75–1 BCA par. 11,066 (January 29, 1975). In that case a contractor unable to obtain the requisite raw materials because of the Middle East war of 1973, was found to be without fault and the default termination to be improper. The situation here is quite different. During the proconstruction conference of July 6, 1973, the Government urged the appellant to enter into a binding agreement with a bituminous subcontractor to assure performance. This the appellant failed to do. It therefore assumed the risk of being able to obtain bituminous supplies when needed at prices compatible with its bid. Appellant now seeks an equitable adjustment to compensate it for the alleged additional cost required to obtain the bituminous material. This Board has no authority to modify this fixed price construction contract due to spiraling costs. *Columbia Contractors, Inc.* v. *U.S.*, 20 CCF par. 83,238 (Ct. Cl. 1974); *Angles Enterprise Co., Ltd.*, ASBCA No. 18929 (June 25, 1974), 74–2 BCA par. 10,739; *Key Control Systems, Inc.*, GSBCA No. 4053 (August 27, 1974), 74–2 BCA par. 10,798.

The appeal is denied.

KARL S. VASILOFF,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

STATE OF ALASKA DEPARTMENT OF HIGHWAYS

20 IBLA 261

Decided *May 19, 1975*

Appeal from the decision of the Alaska State Office of the Bureau of Land Management which canceled a material site right-of-way issued pursuant to the Federal Aid Highway Act.

Vacated and remanded.

1. Rights - of - Way: Cancellation—Rights-of-Way: Federal Highway Act

Section 108 of Title 23, United States Code, does not require a state to file with the Department of the Interior proof of construction or utilization of a material site right-of-way issued pursuant to the Federal Aid Highway Act.

The "Secretary" referred to in that section is the Secretary of Transportation, and administration of that provision is a function of the Department of Transportation. Therefore, an apparent failure of compliance by the state does not mandate summary cancellation of the right-of-way by the Department of the Interior.

2. Rights - of - Way: Cancellation—Rights-of-Way: Conditions and Limitations—Rights-of-Way: Federal Highway Act

The Bureau of Land Management in granting a material site right-of-way pursuant to 23 U.S.C. § 317 (1970), may impose special terms and conditions which are not incompatible with the Act or the public interest, and a failure on the part of the grantee to comply will make the right-of-way subject to cancellation.

3. Rights - of - Way: Cancellation—Words and Phrases

Where a regulation recites that a right-of-way "shall be subject to cancellation" for violation of its terms and conditions, the authorized officer is invested with the discretion to cancel or not, depending upon the circumstances.

APPEARANCES: Jack M. Spake, Central District Engineer, and Donald E. Bietinger, Central District Right of Way Agent, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

On July 26, 1966, the Anchorage office of the Bureau of Land Management (BLM) granted appellant a material site right-of-way pursuant to the Federal Aid Highway Act of August 27, 1958, 72 Stat 916, 23 U.S.C. § 317 (1970). The grant was not subject to expiration upon a specific term of time, but it was expressly conditioned upon compliance with the applicable regulations and the filing of "proof of construction" within seven years from the date of the grant, as well as various other terms and conditions.

On June 30, 1972, the State of Alaska Department of Highways filed its "Proof of Construction and Utilization" in the form of sworn affidavits by the Southcentral District Highway Engineer and the District Right of Way Engineer, each of whom asserted that the material site has been utilized and will continue to be utilized for construction and maintenance of that

specific project described in the original right-of-way application.

Apparently the filing of this proof engendered some disbelief on the part of a Bureau employee, who is identified only by initials, who noted in the file, "I don't think this has been constructed." A field examination was conducted for the purpose of determining "if the construction has been completed on this R/W." The examiner reported that no attempt had been made to construct the material site or the haul road, and he recommended that the proof of construction and utilization submitted by the Department of Highways be rejected. The BLM's Area Manager and District Manager each concurred in these findings and the recommendation.

The BLM's Alaska State Office then wrote to the Department of Highways, informing it of what had transpired and inviting it to submit information "to show conclusively that the land was used as specified in the proof of use," failing in which, the BLM advised, "the right of way will be canceled."

After some delay the highway department requested an extension of the time for filing proof of use until 1977, noting that it had programmed construction in 1975 which would utilize this right-of-way and materials source. This was reiterated in a subsequent letter, which further advised that the construction scheduled for 1975 is, in fact, a Federal-aid project to be funded, in part, with Federal funds.

Nevertheless, by its decision of November 29, 1974, the BLM's Alaska State Office canceled the right-of-way. The decision stated that a regulation (43 CFR 2802.22)[1] and statute (23 U.S.C. § 108) provide a seven-year period for filing proof of construction or use, and that the Federal Aid Highway Act does not provide for an extension of time for filing such proof.

The Department of Highways has appealed, disputing the applicability of the regulation and the section of the statute cited in the decision, as well as the Bureau's interpretation of those provisions. Appellant further points to the only provision in the Act for termination of such a right-of-way, 23 U.S.C. § 317(c), which states:

> If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary [of Transportation] and such lands or materials shall immediately revert to the control of the Secretary of the Department from which they had been appropriated.

Additionally, appellant asserts that it did in fact utilize a portion of the right-of-way for a Federal-aid project in 1967 for the roadway paving improvement on Project F–046–1(6), Tok Cut-Off, mile 0 to 9.5. It also states that Federal funds were expended for survey and soils exploration, and for the access road to this material site. Moreover, appellant states:

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[1] An apparent typographical error. The decision was probably intended to read "43 CFR 2802.2–2."

The location of the Material Source is critical to the proposed Federal Aid Highway Project F-046-1(3) and Project F-046-1(6) scheduled for construction in 1975, which includes grading, widening and paving of 16.1 miles.

The site area has been listed as a Material Source because of its particular location advantage to this project and has been designated a source capable of producing 500,000 cubic yards of suitable road building material for the project. The nearest Material Source is approximately 4 miles in one direction and approximately 6 miles in the other direction, indicating the immediate need for a Material Source within an economical haul distance.

[1] We agree with the appellant that 23 U.S.C. § 108 (1970) does not require a state to furnish proof of construction to the Department of the Interior within seven years. The "Secretary" referred to in that section originally meant the Secretary of Commerce and now means the Secretary of Transportation, and administration of this provision is a function of the Department of Transportation. Therefore, a failure of compliance by the State does not mandate summary cancellation of the right-of-way by the Department of the Interior. Accordingly, we find that the BLM's reliance on 23 U.S.C. § 108 (1970) was misplaced.[2]

[2] However, notwithstanding the confusion concerning the applicability of section 108, there is nothing which prevented the BLM from independently imposing a separate requirement for proof of construction within seven years, which it did in this case by special stipulation. The stipulation is not incompatible with section 108, or with any other provision of the Act, nor is it incompatible with the public interest. This requirement being an express condition of the grant, we need not further concern ourselves with section 108, but we may proceed in an effort to discover whether appellant complied.

The "Proof of Construction and Utilization," consisting of the notarized statements of two of appellant's supervisory engineers, was timely filed. Their allegations of prior utilization, although disputed by BLM, is reiterated on appeal. This is clearly a question of a controverted fact concerning which both sides might have provided more evidence. A letter in the file alludes to a meeting held at BLM's district office and to a conversation between a BLM adjudicator and appellant's District Right of Way Agent. Although both the meeting and the conversation apparently concerned the filing of the proof and BLM's rejection of it as unacceptable, the case record has not been documented to reflect what transpired. On the basis of the existing record we are unable to decide whether the proof should have been accepted or not.

We must necessarily consider whether the Bureau has the authority to summarily cancel a material site right-of-way granted pursuant to 23 U.S.C. § 317 (1970), in any event. No such authority is ex-

[2] Judge Fishman believes that 23 U.S.C. § 108 (1970) has no applicability whatsoever to material sites, but is only applicable to highways.

pressly created by the Act. However, the Secretary of the Interior, in promulgating regulations for the implementation of the Act, has recognized an inferred authority to cancel such a right-of-way. 43 CFR 2821.5 provides that such grants "will be subject to (1) all the pertinent regulations of this part * * *, and (2) any conditions which he [the authorized officer of the BLM] deems necessary." 43 CFR 2802.2–3 provides:

> Unless otherwise provided by law, rights-of-way are subject to cancellation by the authorized officer for failure to construct within the period allowed and for abandonment or nonuse.

43 CFR 2802.3–1 states:

> All rights-of-way approved pursuant to this part, except those granted for pipelines pursuant to section 28 of the Act of February 25, 1920, as amended August 21, 1935 (49 Stat. 678; 30 U.S.C. 185), shall be subject to cancellation for the violation of any of the provisions of this part applicable thereto or for the violation of the terms or conditions of the right-of-way. No right-of-way shall be deemed to be canceled except on the issuance of a specific order of cancellation.

Quite clearly, then, the regulations make such rights-of-way *subject to* cancellation by the authorized officer for nonconstruction, nonuse, abandonment, violations of the regulations, or of the terms and conditions of the grant. *See Southern Idaho Conf. of 7th Day Adventists* v. *United States*, 418 F.2d 411 (9th Cir. 1969).

[3] The fact that a right-of-way is subject to cancellation under these circumstances does not mean that it must be canceled. The employment of the words "subject to" [an action] in a regulation has been held to invest the administrative officer with the discretion to determine whether noncompliance in a given instance should be excused or whether the prescribed penalty should be imposed. *Tagala* v. *Gorsuch*, 411 F.2d 589 (9th Cir. 1969); *Pressentin* v. *Seaton*, 284 F.2d 195 (D.C. Cir. 1960). Use of the term "subject to" said the Court in *Pressentin*, "left the door wide open to a consideration of circumstances." At 199.

Having concluded that if the appellant failed to comply with the special stipulation, the authorized officer of the Bureau had the authority to cancel the right-of-way at his discretion, we turn now to an examination of whether cancellation was appropriate under the circumstances.

First, we again note that it is not conclusively established that there was in fact a failure of compliance by the appellant. Next, we note appellant's assertion of an immediate need for the material for use in a Federal-aid project. Further, we find that there has been no consultation with the Department of Transportation regarding the effect of the action taken on federally funded highway projects with which that agency is properly concerned under the Act. Finally, there is no showing of any need for the land involved for any other supervening public purpose. Indeed, the decision

of the Alaska State Office recites that, "This cancellation is without prejudice to the grantee's right to submit a new application for a right-of-way covering the same lands if the site is still needed for construction and/or maintenance of a Federal-aid highway."

In these circumstances we do not find that it was necessary or desirable in the public interest to summarily cancel the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated. However, the State of Alaska Department of Highways is directed to file an acceptable proof of construction and/or utilization of this site on or before September 30, 1976, failing in which the right-of-way shall be subject to cancellation.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

JOSEPH W. GOSS,
Administrative Judge.

FREDERICK FISHMAN,
Administrative Judge.

UNITED STATES STEEL CORPORATION

4 IBMA 175

Decided *May 19, 1975*

Appeal by United States Steel Corporation from a decision by Administrative Law Judge James A. Broderick (Docket No. HOPE 74-1371), dated November 18, 1974, dismissing an Application for Review of an Order of Withdrawal issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969,[1] hereinafter the "Act."

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Generally

An Order of Withdrawal will be vacated where it is served upon a person who is neither responsible for the violation or condition alleged nor for the safety of the miners involved.

APPEARANCES: Billy M. Tennant, Esq., for appellant, United States Steel Corporation; Richard V. Backley, Esq., Assistant Solicitor, and Michael V. Durkin, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On April 24, 1974, a Mining Enforcement and Safety Administration (MESA) inspector issued a section 104(a) Order of Withdrawal to United States Steel Corporation (U.S. Steel) alleging that one of the front-end loaders used to load coal from the storage pile at the mine portal onto trucks for a two-

[1] 30 U.S.C. §§ 801-960 (1970).

mile trip to the preparation plant was defective and constituted an imminent danger. The Order withdrew and restrained operation of the defective equipment and was lifted some two days later when the equipment was repaired and deemed safe by the inspector to resume hauling operations. A timely Application for Review of the Order was filed by U.S. Steel pursuant to section 105 of the Act and the matter was set for hearing.

The pertinent history of the haulage operation is as follows:

At some time prior to 1966, U.S. Steel entered into a contract with C. J. Langenfelder and Son, Inc., (Langenfelder) whereby the latter agreed to operate the loading and haulage operation at the site in question. The entire Langenfelder operation is carried out on U.S. Steel property. The equipment for the Langenfelder haulage operation consisted of two front-end loaders, a number of trucks, and a repair shop, all owned by Langenfelder. Under the contract Langenfelder is required to haul coal at a rate to keep the preparation plant steadily supplied. For this service, Langenfelder is paid a set fee per ton of coal hauled. In August 1970, as a result of overtures by the United Mine Workers of America (UMWA), all of the nonsupervisory employees involved in the Langenfelder haulage operation were placed on U.S. Steel's payroll in order to make them eligible for seniority rights, fringe benefits, and UMWA pension. In addition, Langenfelder was required to select all new employees from a panel maintained jointly by U.S. Steel and the union. These men could be discharged or disciplined only by U.S. Steel, although Langenfelder could remove them from its haulage operation at any time. Langenfelder was required to train its own personnel. Under the agreement, U.S. Steel paid the workers and billed Langenfelder monthly for the labor services provided.

At the hearing, held on September 12, 1974, the Administrative Law Judge (Judge), in addition to taking the above evidence, heard testimony that Langenfelder took directions from U.S. Steel, where appropriate, consisting of orders to slow down or increase the haulage of coal in order to keep the preparation plant fully supplied. On the basis of the foregoing, the Judge concluded that although Langenfelder was immediately responsible for the defective equipment cited and which prompted issuance of the withdrawal Order, U.S. Steel as operator of the mine was the proper party to be held responsible for violations of the Act. In his decision, the Judge found as follows:

1) U.S. Steel was the employer of the men who worked in the haulage operation and whose safety was involved.

2) U.S. Steel operated the coal mine; Langenfelder's responsibility was subordinate to the purpose of producing coal for U.S. Steel, and Langenfelder was subject to the general supervision of U.S. Steel.

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The issue of imminent danger was raised in the instant case; however, in view of our disposition, we need not consider that question herein.

Contentions of the Parties

The appellant, U.S. Steel, contends that Langenfelder is an independent contractor solely responsible for the cited defective equipment and as such should have been served with the Order for the reasons that: 1) Langenfelder owns and maintains the equipment here involved and by contract warrants that it will comply with the Occupational Health and Safety Act of 1970 and applicable regulations; 2) prior to 1970 the employees involved were employed and paid by Langenfelder, but became U.S. Steel employees in 1970 only because of the request by UMWA; 3) although the employees are paid by U.S. Steel, Langenfelder reimbursed U.S. Steel for such wages, thus rendering Langenfelder their de facto employer; 4) although U.S. Steel may hire or discharge the employees, Langenfelder determines their qualifications and may reject or remove any employee; 5) Langenfelder owns and operates the maintenance shop where the equipment is repaired and parked when not in use; 6) Langenfelder trains the employees selected to operate the hauling equipment; 7) U.S. Steel does not inspect the equipment for safety and its mechanics are not qualified to do so; and 8) the control possessed and exercised by U.S. Steel over Langenfelder consists only of notifying Langenfelder to increase or decrease the rate of hauling or to stop hauling coal if the preparation plant is shut down.

In its brief on appeal, the Mining Enforcement and Safety Administration (MESA) contends that Langenfelder was properly found to be an agent of U.S. Steel for the following reasons: 1) U.S. Steel possessed complete control over the employment site, the stockpile, the dumping bin at the preparation plant and the road in between; 2) it could select and discharge the employees working in the haulage operation; 3) U.S. Steel paid the employees involved although reimbursed by Langenfelder; and 4) it had the right to direct and control the manner in which these employees performed their work.

Issue Presented

Whether the Order of Withdrawal was properly issued to U.S. Steel as the person responsible for the alleged dangerous condition and the safety of the employees exposed thereto.

Discussion

In *Affinity Mining Company*, 2 IBMA 57, 60, 80 I.D. 229, 1971–1973 OSHD par. 15,546 (1973), the Board held that the common law status of "independent contractor" had not been abrogated by the Act. We also concluded that, "* * * while more than one person may fall technically within the definition of 'op-

erator,' only the one responsible for the violation and the safety of employees can be the person served with notices and orders * * *."[2]

The Judge concluded, and we agree, that Langenfelder was responsible for the alleged violation (defective equipment) cited in the Order. However, we do not agree with his concluson that U.S. Steel is responsible for the safety of the employees involved in the haulage operation. Our review of the record indicates that: 1) U.S. Steel's position as hirer, firer, and payer of the men who operated the equipment used in the coal haulage operation was solely an adjunct by virtue of its contract with the United Mine Workers; 2) Langenfelder had full authority to remove any of the men involved from its operation at anytime; 3) Langenfelder was solely responsible for the maintenance and safe upkeep of the equipment involved; 4) Langenfelder, in effect, paid the men involved by reimbursing U.S. Steel for their services; 5) Langenfelder had day to day control over the employees as well as the details and methods of performing the work required to keep the preparation plant supplied with coal; and 6) U.S. Steel had only such control as provided under the independent contractor agreement, *i.e.*, to oversee performance of the contract.

[1] Based upon the above characteristics of the arrangement, the Board believes that U.S. Steel did not have the right of control over Langenfelder's operations such as would constitute a Master-Servant or Principal-Agent relationship. U.S. Steel controlled only the result of performance of the contract, not its means of performance. As we see it U.S. Steel had the characteristic of a master,[3] only with respect to its power of ultimate dismissal. This power falls within the terms of the UMWA contract with U.S. Steel and is not governed by the agreement between U.S. Steel and Langenfelder. In any event Langenfelder had the immediate power of removal of any employee from its operation and had complete control over its equipment. Accordingly, we find that U.S. Steel cannot be held responsible for violations of the Act involving defective equipment used in the coal haulage operation nor for the safety of the men involved in that operation.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS REVERSED, the Application

[2] In connection with the liability of an independent contractor for violations of the Act see *John Wilson & Ronald Rummel* v. *Laurel Shaft Construction Company, Inc.*, 1 IBMA 217, 79 I.D. 701, 1971-1973 OSHD par. 15,387 (1972).

[3] The four characteristics of the master in a master-servant relation are: 1) Power of selection and engagement of the servant, 2) Payment of wages, 3) Power of dismissal, and most importantly, 4) Power of control of servant's conduct. (53 Am. Jur 2d, Master and Servant, § 2.)

for Review is GRANTED, and the Order of Withdrawal is VACATED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

EASTERN ASSOCIATED COAL CORPORATION

4 IBMA 184

Decided *May 23, 1975*

Appeal by Eastern Associated Coal Corporation from a decision by Administrative Law Judge Paul Merlin, dated April 9, 1974, wherein he upheld an unwarrantable failure withdrawal order and notice of violation issued pursuant to section 104(c) of the Federal Coal Mine Health and Safety Act of 1969 in Docket Nos. HOPE 74–148 and MORG 74–33.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Roof Control

Under section 302(a) of the Act, the failure to prevent a person from proceeding beyond the last permanent roof support into an area lacking in the adequate temporary support required by the existing roof control plan constitutes a single violation. 30 U.S.C. § 862(a) (1970), 30 CFR 75.200.

2. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Notices of Violation

A notice of violation issued pursuant to section 104(c)(1) of the Act may not be challenged directly, by itself, in an Application for Review under section 105 of the Act where the violation cited therein has been abated.

APPEARANCES: Daniel M. Darragh, for appellant, Eastern Associated Coal Corporation; Richard V. Backley, Esq., Assistant Solicitor, John P. McGeehan, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

We are called upon here to review certain rulings in a decision, dated April 9, 1974, which was rendered by Administrative Law Judge Paul Merlin with respect to Docket Nos. HOPE 74–148 and MORG 74–33. Each of these dockets involved an Application for Review which was filed pursuant to section 105(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 815 (a) (1970). They were consolidated below by order of the Judge for purposes of hearing and initial decision.

In Docket No. HOPE 74–148, the Judge concluded, *inter alia*, that a section 104(c)(2) order of withdrawal, No. 1 WSP, dated November 15, 1973, properly cited appellant Eastern Associated Coal Corporation (Eastern) under 30 CFR 75.200 for two violations, namely, allowing a roof bolter to work inby permanent support under a roof lacking adequate temporary support, and a deviation

from the roof control plan. 30 U.S.C. § 814(c)(2) (1970). Eastern challenges that conclusion on the ground, that in reality, the subject withdrawal order cited only one violation, namely, the presence of a person under a roof lacking in the number of adequate temporary supports prescribed in the roof control plan.[1] For the reasons set forth below, we hold that the Judge erred in ruling that the withdrawal order cited Eastern for two violations and in basing thereon his conclusion that such violations both occurred.

In Docket No. MORG 74-33, the Judge concluded that a violation cited in a notice of violation issued pursuant to section 104(c)(1) of the Act was the result of an unwarrantable failure to comply. 30 U.S.C. § 814(c)(1) (1970). On appeal, Eastern contends that this ultimate finding is contrary to the evidentiary record. For the reason stated hereinafter, we hold that the subject application for review was subject to dismissal for want of jurisdiction, and accordingly, we do not reach the merits.

[1] Alternatively, Eastern argues that, assuming, *arguendo*, that the withdrawal order was intended to charge a failure to prevent a roof bolter from working under an unsupported roof, it does not do so with sufficient detail as required in subsection (c) of section 104 and it does not constitute an adequate notice of violation. 30 U.S.C. § 814(c) (1970). Since we resolve this phase of Eastern's appeal by acceptance of its initial contention, we do not reach the alternative argument and we intimate no views as to its soundness.

I.

Factual and Procedural Background

A.

Docket No. HOPE 74-148

The withdrawal order in dispute in the above-captioned hearing docket was issued by Inspector William S. Pauley on November 15, 1973, at Eastern's Wharton No. 2 Mine pursuant to section 104(c)(2) of the Act. More specifically, this order, denominated 1 WSP, concerned a condition observed by the inspector in the 5 Butt 1 West section of the subject mine.

The conditions described in the withdrawal order read as follows:

> The approved roof control plan was not being complied with in No. 2 Entry crosscut in 5 Butt 1 West section in that work was being performed inby permanent roof support and temporary support was not installed. The roof bolting machine operator, Billy Vance, was installing roof bolts inby permanent support.

In addition, Inspector Pauley made the following findings with reference to the above-quoted conditions: (1) that there had been a violation of 30 CFR 75.200; (2) that such violation had not created imminent danger; (3) that it could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard; (4) that it had been caused by an un-

warrantable failure to comply; and (5) that it was similar to the violation which gave rise to Order 1 GK on September 26, 1973.

On November 28, 1973, Eastern timely filed in the Hearings Division an Application for Review pursuant to section 105(a) of the Act. On December 6, 1973, MESA filed its Answer in Opposition generally denying Eastern's allegations and averring that the subject withdrawal order was properly issued. Some six days later, on December 12, 1973, the United Mine Workers of America (UMWA) filed its Answer in Opposition, also joining issue with Eastern.

B.

Docket No. MORG 74-33

On October 24, 1973, at 3 a.m., Inspector Arthur L. Cross issued Notice 2 ALC during an inspection of the 2 Right section of Eastern's Joanne Mine. The notice was issued pursuant to section 104(c)(1) of the Act, 30 U.S.C. § 814(c)(1) (1970), and charged a violation of 30 CFR 75.606. The condition cited in the subject notice reads as follows:

> The shuttle car, serial No. 1475, in 2 Right is running on the trailing cable of such shuttle car energized on the return trip from the dumping point.

In addition, the inspector made findings, manifested on the face of the notice, to the effect that the alleged violation could have significantly and substantially contributed to the cause and effect of a mine safety or health hazard and that it was caused by an unwarrantable failure to comply with the above-cited mandatory standard. The notice provided for abatement by 5:30 a.m., which was apparently accomplished.

On November 8, 1973, subsequent to abatement, Eastern filed an Application for Review with respect to the subject notice. The issues were joined when MESA and the UMWA filed Answers in Opposition, respectively.

C.

Consolidated Proceedings

A prehearing conference for these two dockets was held on February 13, 1974, and prehearing statements were filed by all parties. Subsequently, a full evidentiary hearing was held on February 26, 1974. The Judge handed down his decision on April 19, 1974.

With respect to Docket No. HOPE 74-148, the Judge held, *inter alia*, that Order of Withdrawal 1 WSP cited Eastern for *two* violations of 30 CFR 75.200: (1) a failure to conform to the roof control plan in that there was a lack of adequate temporary roof support; and (2) roof bolting under an inadequately supported roof. He concluded that the withdrawal order was valid insofar as the former violation was concerned; however, it was invalid with regard to the latter for the reason that such violation was not caused by an unwarrantable failure to comply.

With respect to Docket No. MORG 74–33, the Judge determined that the subject notice of violation was valid in all respects.

Pursuant to 43 CFR 4.600, Eastern filed a timely appellate brief together with a request for oral argument. MESA filed reply briefs with respect to both proceedings on July 5, 1974. The UMWA has not participated in this appeal.

Having concluded that oral argument will not contribute significantly to the resolution of the issues in this case, Eastern's request for the same will be denied.

II.

Issues on Appeal

A. Whether the Administrative Law Judge erred in holding in Docket No. HOPE 74–148 that Eastern was cited for and did commit two violations of 30 CFR 75.200.

B. Whether the Application for Review of a section 104(c)(1) notice of violation should be dismissed for want of jurisdiction.

III.

Discussion

A.

Docket No. HOPE 74–148

[1] During proceedings below, Eastern challenged the validity of Order 1 WSP, insofar as it charged roof bolting under an inadequately supported roof, on two grounds: (1) that the subject order did not cite such a violation; and alternatively, (2) that assuming, *arguendo*, that the order did cite such a violation, the alleged violation was not caused by an unwarrantable failure to comply. The Judge rejected the threshold argument, but held for Eastern with respect to its alternative contention. Nevertheless, Eastern urges us to review and reverse his ruling on its initial argument.

If Eastern were prosecuting this appeal merely for the abstract satisfaction to be derived from vindication of its threshold attack on the validity of the subject withdrawal order, we would dismiss, there being no live controversy concerning an adverse determination damaging to its concrete interests. It is clear, however, that Eastern has not brought this appeal to the Board for idle purposes, but rather, out of a well-founded expectation that the Judge's adverse ruling, if not overturned on appeal, could be conclusive in any subsequent penalty proceeding, a consequence which may be of considering pecuniary interest to appellant. 30 U.S.C. § 819 (1970).

The condition cited in the order, which we quoted above, *appears* to consist of *a* deviation from the roof control plan in *two* respects, namely, absence of temporary posts and roof bolting under an inadequately supported roof. Considered by itself, the phrasing of the paragraph labeled on the form as "condition" sheds little light, if any, on the question of whether two violations

were charged or just one. The ambiguous, inartful mixing of the singular and plural by the inspector in describing what he observed makes the order susceptible to either interpretation.

However, the ambiguity dissipates considerably when we examine the *other* findings made by the inspector pursuant to section 104(c) as follows:

> There has been *a violation* of § 75.200 of Part 75, Title 30, Code of Federal Regulations, a mandatory health or safety standard, but *the violation* has not created an imminent danger.
>
> * * * *the violation* is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and is caused by an unwarrantable failure to comply with such standard.
>
> * * * *the violation* is similar to the violation of the mandatory health or safety standard which resulted in the issuance of Withdrawal Order No. 1 GK, on September 26, 1973, and no inspection of the mine has been made since such date which disclosed no similar *violation*. (Italics added.)

In each instance, the above-quoted findings refer to a singular violation. It is true that these findings represent form statements, each of which the inspector adopted by checking off an adjacent box. Nevertheless, if the inspector had wanted to cite *two* violations pursuant to section 104(c), it would have been a simple matter for him to so indicate by pluralizing the subjects and verbs of his findings. Having failed to do so, the inference to be drawn is that the inspector cited only one violation and had used the withdrawal order form to record all key observations relevant to the citation *as a whole*.[2]

Furthermore, it appears to us that in writing the subject withdrawal order the inspector was simply making necessary findings with respect to the elements of a violation of the operator's obligation to ensure that "* * * No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is *not* required under the roof control plan and the absence of such support will not pose a hazard to miners. * * *" The failure to comply with such obligation at one time is a single violation.

On the basis of the foregoing, we conclude that the Judge was misled into an erroneous construction of the subject withdrawal order by the inspector's ambiguous description of the findings that gave rise to that order. Although the error is easily understandable, given the ambiguity, it was nevertheless prejudicial to Eastern. We, therefore, hold that Order 1 WSP cited Eastern for one violation, namely, the presence of a person inby the last per-

[2] We note, that in arguing about the content of the withdrawal order, Eastern relies upon the provisions of a stipulation entered into by all parties. (Tr. 3–4; Prehearing Statement of Eastern, par. 3; Prehearing Statement of the UMWA, par. 4(b).) We have examined this stipulation with care and find that it exhibits the same confusing usage of the singular and plural with which the subject withdrawal order is afflicted. Thus, it is useless for the purpose of determining precisely whether the inspector cited one violation or two.

manent support under a roof lacking in the number of temporary supports required by the roof control plan. Accordingly, we are setting aside findings and conclusions of the Judge inconsistent with that holding.

B.

Docket No. MORG 74–33

[2] As noted earlier, the dispute in the above-captioned hearing docket concerns a notice of violation, citing an infraction of 30 CFR 75.606, pursuant to section 104(c)(1) of the Act. 30 U.S.C. § 814(c)(1) (1970). On appeal, the sole contention of Eastern is that the Judge erroneously concluded that the alleged violation was the product of an unwarrantable failure to comply.

We cannot, however, address ourselves to Eastern's argument because there is a jurisdictional impediment which compels us to affirm the Judge's order of dismissal.

Eastern's Application for Review seeks *direct* adjudication of the validity of a notice of violation issued pursuant to section 104(c)(1) of the Act where the violation had been abated. In *Zeigler Coal Company*, 4 IBMA 139, 82 I.D. 221, 1974–1975 OSHD par. 19,638 (1974), which was decided subsequent to the filing of this appeal, we concluded that, insofar as abated violations are concerned, the validity of a section 104(c)(1) notice *by itself* is not subject to challenge at the initiative of the operator by Application for Review. We held that the validity of such a notice may only be challenged at the operator's initiative as an incident to an adjudication of the validity of a related section 104(c)(1) withdrawal order. We hereby reaffirm the legal conclusions we reached in *Zeigler*, *supra*, and hold them to be dispositive of the case at hand.

Accordingly, we have decided to set aside the Judge's findings and conclusions with respect to this hearing docket and to affirm his order of dismissal for the reason that there is no jurisdiction.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that oral argument for each of the above-listed hearing dockets IS DENIED and the decision in Docket No. HOPE 74–148 IS AFFIRMED AS MODIFIED.

IT IS FURTHER ORDERED that the findings and conclusions of the Administrative Law Judge in Docket No. MORG 74–33 ARE SET ASIDE and the dismissal of the Application for Review IS AFFIRMED for the reason stated in the foregoing opinion.

DAVID DOANE
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

ESTATE OF JOSEPH RED EAGLE

4 IBIA 52

Decided *May 30, 1975*

Appeal from an Administrative Law Judge's order denying petition for rehearing.

Affirmed and dismissed.

1. Indian Probate: Wills: Undue Influence—425.30: Failure To Establish, Opportunity—425.30.2

The Department of the Interior has held consistently that mere suspicion or an opportunity to influence testator's mind will not sustain an allegation of undue influence where convincing proof is lacking that a person did actually exert influence or there was pressure operating directly upon the testamentary act.

2. Indian Probate: Wills: Testamentary Capacity: Generally—425.28.0

To be competent to make a will the testatrix had to know without prompting not only who were the natural objects of her bounty but also the nature and extent of the property of which she was about to dispose, and the consequences of the dispositions which she was making.

APPEARANCES: Dennis A. Dellwo of Dellwo, Rudolf and Schroder, for appellant, Felix A. Aripa; Walter B. Dauber of Tonkoff, Rakow, Dauber and Shaw for appellee, Hobart C. Bowlby.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

Felix A. Aripa, hereinafter referred to as appellant, through his attorneys hereinabove identified, has filed with this Board an appeal from an Administrative Law Judge's decision denying his petition for rehearing in the above-entitled matter.

Joseph Red Eagle, hereinafter referred to as the decedent, executed a last will and testament on August 21, 1957, in favor of Hobart C. Bowlby, a non-Indian, hereinafter referred to as appellee.

The above-entitled matter was remanded by this Board to Administrative Law Judge Snashall on July 30, 1973, for the purpose of conducting a hearing *de novo* to determine heirs, to approve or disapprove wills and to determine creditors' rights, if any. Pursuant to said order the Judge on May 1, 1974, heard the matter at Toppenish, Washington. Thereafter, from the evidence adduced at said hearing the Judge on June 14, 1974, approved the decedent's last will and testament of August 21, 1957, and ordered distribution of decedent's entire trust estate in accordance therewith to the appellee.

Feeling aggrieved by said order of June 14, 1974, the appellant, through his attorneys, filed a petition for rehearing on August 8, 1974. In support of his petition for rehearing the appellant in essence contended:

1. That the findings of the Hearing Examiner [sic] were incorrect and that there was overpowering evidence of undue influence and overreaching on the part of Hobart Bowlby rendering the will executed August 21, 1957, invalid.

2. That there was much evidence available both in the record and available to the court through subpoena, showing that Joseph Red Eagle had insufficient mental capacity for the execution of the last will and testament at the August 21, 1957, signing.

The Administrative Law Judge on September 20, 1974, denied the petition for rehearing in the following language and for the following reasons:

Petitioner bases his request for rehearing upon two basic contentions: (1) that the decision upholding the Last Will and Testament is not supported by the evidence, and (2) that he has new evidence tending to show that the testator lacked the prerequisite competency necessary to the execution of his Last Will and Testament.

Petitioner's first argument is basically an argument on the facts, or more exactly, upon the purport of the evidence adduced on hearing. I can well understand his interpretation of the evidence since I am certainly not unmindful of the fact there was substantial evidence upon which enumerable inferences could have been raised in support of petitioner's position on the import of the evidence. However, I am bound by the preponderance of the evidence rule and certainly the preponderance of the evidence in this case clearly compels and supports the final Order of which petitioner is aggrieved. I therefore find no basis for rehearing on this ground.

The petitioner's second ground for relief, that of new evidence, is formulated on his contention that certain medical records, medical testimony and lay witness testimony in substantiation of the former if produced would establish that decedent's mental capacities were so deteriorated at the time of the signing of the August 21, 1957 Last Will and Testament as to have denied testator the requisite mental capacity. He states however the medical records were not available to him at the first hearing short of subpoena, that the medical testimony was unavailable due to the illness of the examining physician and that the lay witnesses refused to appear at the hearing except under compulsion of a subpoena. The controlling regulations provide, inter alia, that a Petition for Rehearing based upon newly discovered evidence ". . . shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision." 43 CFR § 4.241 (a). Petitioner has not provided "justifiable reasons" for his failure to present this evidence at the time of the hearing prior to the final decision. This matter has been heard twice and the record in both hearings fails to reflect any previous request for the issuance of subpoenas on behalf of petitioner in any case, let alone for the appearance of the persons and records now alleged to be the prevailers of new evidence. Nor did petitioner present, in lieu of witnesses, affidavits of the allegedly illusive witnesses upon a showing of their unavailability. This matter has been pending since at least July 28, 1971, the date upon which petitioner was first given notice of hearing to determine heirs or probate the will of Joseph Red Eagle and he cannot now be heard to complain of an alleged inability to obtain medical records and witnesses he deems essential to his case. The petitioner's request is not timely.

Additionally, and merely as dicta, it does not appear from the documents, records and excerpts of medical testimony filed by petitioner with his argument on behalf of his petition that he would be able to sustain his position in any event. An examination of these attachments disclose an apparent inability upon the part of medical technology to determine with any degree of certainty

at what point decedent became legally incompetent to execute a Last Will and Testament. To invalidate a will for lack of testamentary capacity, evidence must show the condition to exist at the time of the execution of the will. *Estate of Martha DeRoin*, IA-874 (1957). Since the medical testimony would at best be based upon conjectural determinations it is doubtful such evidence could overcome the clear and concise testimony of the attesting witnesses to the will to the effect the testator was of sound and disposing mind and in full control of his faculties at the time of the execution of the subject Last Will and Testament.

The Administrative Law Judge in furtherance of his denial stated:

Two hearings were held in this matter in order to give all concerned parties in interest ample opportunity to present their evidence. They were afforded a full and complete hearing with the right of calling whatever witnesses they wished and with full right of cross-examination. The Petition for Rehearing notably fails to set out any additional reason why this matter should again be set for hearing and it does not appear in view of the foregoing conclusions the result in this matter would be changed or altered by granting a rehearing at this time.

It is from said denial of September 20, 1974, that the appellant has appealed to this forum.

The appellant in support of his appeal sets forth substantially the same reasons as those set forth in his petition for rehearing. These reasons in short are:

(1) That undue influence was exerted upon Joseph Red Eagle at the time the will was executed on August 21, 1957.

(2) That Joseph Red Eagle did not have the capacity or competency to make a will on August 21, 1957.

The appellant's first contention that undue influence was exerted on the decedent is without merit. The burden of proving undue influence rested on the appellant. In order to sustain undue influence the evidence must be clear, cogent and convincing. The appellant in the case at bar has failed to do so. At best, the appellant has shown only that mere opportunity existed for the exercise of influence upon the decedent.

[1] The Department of the Interior has held consistently that mere suspicion of an opportunity to influence testator's mind will not sustain an allegation of undue influence where convincing proof is lacking that a person did actually exert influence or there was pressure operating directly upon a testamentary act. *Estate of Charles Mjissepe (Pack choa be) or Sapesa Polecat*, IA-T-3 (May 12, 1967). [Same case as IA-1284 (May 2, 1966.)] To invalidate a will on the ground of undue influence, contestant must show such influence to have been exerted to the extent of destroying the free will of the testator or that the will of another was substituted for that of the testator, and this amounts to more than the opportunity or possibility that undue influence was brought to bear on the testator. *Estate of John J. Akers*, IA-D-18 (February 26, 1968). Aff'd *Akers* v. *Morton*, 333 F. Supp. 184 (D. Mont. 1971).

Aff'd *Akers* v. *Morton, et al.*, 499 F.2d 44 (9th Cir. 1974).

Appellant's further contention that a fiduciary relationship existed between Mr. Bowlby and the decedent is likewise without merit. The fact that appellee befriended the decedent and transacted business with him over the years certainly did not establish a fiduciary or confidential relationship between the two. Accordingly, no presumption of undue influence was raised thereby. Therefore, the burden of rebutting such a presumption did not fall upon the appellee. The appellant in support of the contention regarding presumption of undue influence cites the *Estate of Louis Leo Isadore*, IA–P–21 (February 12, 1970); *Estate of Julius Benter*, 1 IBIA 24 (November 17, 1970). The case at bar is distinguishable from *Isadore* and *Benter*, *supra*, in that Mr. Bowlby, the appellee, did not take an active part in procuring the preparation or the execution of the will in question. The record is quite clear that the decedent went to an attorney of his own choice to have the will drawn and that Mr. Bowlby had no connection therewith nor with the preparation or the execution thereof.

Appellant's second contention that decedent at the time of the execution of the will was not of sound or disposing mind is likewise without merit. The weight of the evidence clearly indicates that the decedent was of sound and disposing mind at the time of the execution of the last will and testament in question. The appellant has failed to come forth with any evidence to support his contention that the decedent was not of sound and disposing mind when he executed the last will on August 21, 1957.

[2] The Department in the *Estate of Ruth B. DeHanas Long*, A–25220 (September 21, 1948), regarding the question of competency or testamentary capacity stated:

> To be competent to make a will the testatrix had to know without prompting not only who were the natural objects of her bounty but also the nature and extent of the property of which she was about to dispose, and the consequences of the dispositions which she was making.

The requisite mental capacity which a testator must have to make a valid disposition of his property is the ability to remember, at least in a general and approximate way, the nature and extent of his property, to recognize those who are the natural objects of his bounty, and to comprehend the nature of the testamentary act itself; and, the testator's disinheritance of his heirs and blood relatives is not unnatural *per se*. *Estate of John P. Whitetail*, IA–T–23 (April 17, 1970).

Having reviewed the record and considered the briefs of the parties, this Board finds no valid reason to disturb the Order Denying Petition for Rehearing issued September 20, 1974, by Administrative Law Judge

Robert C. Snashall and the said order should be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing issued September 20, 1974, by Robert C. Snashall, Administrative Law Judge be, and the same is hereby AFFIRMED and the appeal herein is DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

DAVID J. MCKEE,
Chief Administrative Judge.

ADMINISTRATIVE APPEAL OF JENNIFER RAE McQUEEN, A MINOR, BY HAZEL McQUEEN, AS NEXT FRIEND v. CONFEDERATED SALISH AND KOOTENAI TRIBES, FLATHEAD RESERVATION, MONTANA

4 IBIA 65 Decided *June 3, 1975*

Appeal from the decision of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation denying the claim made by the appellant to share in the per capita distribution of judgment funds as provided in the Act of March 17, 1972 (86 Stat. 64).

Reversed.

1. Indian Tribes: Enrollment

For purposes of which the tribe has complete control, the tribe conclusively determines membership: but where departmental action is authorized, the department may approve or disapprove the membership rolls of the tribe.

APPEARANCES: John Paul Jones, Esq., for appellant; Wilkinson, Cragun & Barker, by Richard A. Baenen, Esq., for appellees; Duard Barnes, Assistant Associate Solicitor for Indian Affairs for the Commissioner of Indian Affairs, Amicus Curiae.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

As a result of the successful prosecution of two claims against the United States in the United States Court of Claims, Congress provided for the distribution of judgment funds in the Act of March 17, 1972 (86 Stat. 64), which directed that 85 percent of the judgment funds "shall be distributed in equal per capita shares to each person who is enrolled or entitled to be enrolled on the date of this Act . . ."

Hazel McQueen, a duly enrolled member of the Confederated Tribes, as 11/16 degree Indian, filed an application as Next Friend, for enrollment of her daughter, Jennifer Rae McQueen. The birth certificate was returned to Hazel McQueen by the Tribal Council on April 19, 1972, because it erroneously showed her race to be white. Between April 19, 1972 and June 28, 1972, Hazel McQueen obtained a corrected birth certificate showing her race to be Indian. The appellant was enrolled as a member of the Confederated Tribes on July 28, 1972.

The Tribal Council decided that Jennifer Rae McQueen was not entitled to receive a per capita share of the judgment funds as provided in the Act of March 17, 1972, because the Tribal Council had not received a proper application, and had not approved the enrollment of the appellant for purposes of the judgment distribution. Appellant's counsel on January 9, 1973, requested the Secretary to reverse the determination of the Tribal Council. The Secretary on January 25, 1974, did

reverse the Tribal Council, holding the appellant had erroneously been denied a share of the judgment funds and directed "that necessary action be taken to pay Miss McQueen a share of the funds."

By memorandum of December 19, 1974, addressed to the Director of the Office of Hearings and Appeals, the Secretary in the exercise of authority reserved in 25 CFR 1.2 withdrew his decision in this appeal issued January 25, 1974, and at the same time submitted the matter to the Director for reconsideration and for final decision. Authority for determination of the appeal was transferred to this Board as an Ad Hoc Board by the Director's delegation of authority issued December 20, 1974.

Full and careful consideration has been given to the complete record, including briefs submitted by the appellant, the appellees and the Commissioner of Indian Affairs appearing as *amicus curiae*. We conclude the controlling issues to be:

(1) Does the Secretary have jurisdiction over the matter in question?

(2) Is the Secretary bound to follow his procedural rules as provided in 25 CFR Part 1, specifically 25 CFR 42?

(3) Does the appellant qualify to share in the per capita distribution of judgment funds as provided in the Act of March 17, 1972 (86 Stat. 64)?

With respect to the first issue, the Board recognizes in the absence of express legislation by Congress that a Tribe as a political entity has complete control to determine all questions of its own membership. However, that power is qualified where the question involved is the distribution of tribal funds and other property under the supervision and control of the Federal Government.

[1] It appears that for purposes of which the tribe has complete control, the tribe conclusively determines membership; but where departmental action is authorized, the Department may approve or disapprove the membership rolls of the tribe. *Martinez* v. *Southern Ute Tribe of Southern Ute Reservation*, 249 F.2d 915 (10th Cir. 1957), *cert. denied*, 356 U.S. 960 (1958).

We find that the Secretary of the Interior has jurisdiction over this matter and as trustee of the tribal assets has the responsibility of determining who is entitled to share in their distribution.

Is the Secretary bound to follow his procedural rules as provided in 25 CFR Part 1?

25 CFR provides that the Secretary can waive or make exceptions to his regulations where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians. We find that it is in the best interest of the Indians to waive the regulations in this matter.

Let us look finally to the question of whether the appellant qualifies to share in the per capita distribution of judgment funds as provided in the Act of March 17, 1972.

On March 17, 1972, the same date

of the passage of the Act, the Confederated Tribes unanimously passed Resolution 4225 which provides in part:

> * * * that it is the Council's interpretation of the law that "those eligible for enrollment" means those children born too late to be included on the membership roll prior to payout time and for which application has not been previously made and acted on by the Tribal Council.

Tribal Ordinance No. 35–A unanimously passed and approved on November 3, 1961, provides in part the procedure for enrollment if the applicant is too young to act on his or her own behalf:

> A. *Procedure for enrollment under Article II, Section 3 of the Constitution.*
>
> The applicant, or next friend of applicant if applicant is too young to act on his own behalf, must:
>
> 1. Make formal application to the Tribal Council requesting enrollment as a member of the Confederated Tribes;
>
> 2. Show that he (or she) is a natural child of a member of the Confederated Tribes, giving necessary data on such parent;
>
> 3. Show that he (or she) possesses one-quarter degree or more blood of the Salish and Kootenai Tribes or both, of the Flathead Indian Reservation, Montana;
>
> 4. Show that he (or she) is not enrolled on some other reservation.

The appellant through her next friend, Hazel McQueen, stated that she filed her application for enrollment together with a copy of her birth certificate with the Tribal Council prior to the distribution of the judgment funds. Counsel for appellees in their letter of January 4, 1973, to John Paul Jones, Esq., appellant's attorney, admits that "Her application for enrollment was received before payment, but that the enrollment papers were not in order because her birth certificate listed both parents as white, thus making her ineligible."

We cannot agree that entitlement is predicated upon statements or misstatement made in a birth certificate. Certainly the Tribal Council was aware and on notice either through its own records or otherwise that Hazel C. McQueen was an 11/16 Indian enrollee of the Confederated Tribes. The misstatement in the birth certificate that the mother was white does not change the fact that she was and still is 11/16 Indian. The birth certificate further discloses the birth to Hazel C. McQueen of a daughter, Jennifer Rae McQueen, on March 2, 1972. As the record further shows, in the information supplied to the hospital for birth certificate, Hazel C. McQueen disclosed her color or race to be Indian.

We find that the appellant complied with both Tribal Ordinance No. 35–A and Resolution 4225.

F. J. Houle, Jr., Tribal Secretary, in his letter to appellees' counsel dated September 21, 1972, referring to the appellant, stated in the closing paragraph, "It may be construed that the girl is entitled to the money."

The submission of the corrected birth certificate to the Tribal Council did not make her any more entitled than she was when she submitted her application with birth certificate prior to payout time.

It is interesting to note the statement made by appellees' counsel in his letter of January 4, 1973, to John Paul Jones, counsel for appellant. He said in part:

> * * * Council members have a trust responsibility toward all tribal assets, and to vote to enroll a person whose birth certificate showed her to be ineligible would have been a violation of that trust * * *.

What of the trust responsibilities owed Hazel McQueen and the infant Indian child?

We cannot agree with the conclusion reached by the Council. We conclude that the appellant complied with all the requirements for entitlement short of the ministerial act of being enrolled by the Tribal Council prior to payout time. Consequently, we find that the appellant is entitled to share in the judgment funds as provided in the Act of March 17, 1972 (86 Stat. 64).

The appellees contend that it is not possible for them to pay the appellant her per capita share since they had paid out the 85 percentum decreed under the Act.

We do not agree. Section 1 of the Act states in part that:

> * * * the remainder may be advanced, expended, invested or reinvested for any purposes that are authorized by the tribal governing body and approved by the Secretary of the Interior.

Nonetheless, we conclude that the appellees' contention is of no consequence. We further conclude, the Tribes are obligated to pay the appellant her per capita share.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, the decision of the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation, is REVERSED, and the Tribal Council is DIRECTED to take the necessary action to pay the appellant, Jennifer Rae McQueen, her per capita share of the funds.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

OLD BEN COAL COMPANY [1]

4 IBMA 198

Decided *June 6, 1975*

Appeal by Old Ben Coal Company from a decision in a consolidated section 105 and section 109 proceeding by Administrative Law Judge Joseph B. Kennedy (Docket Nos. VINC 73-96 and VINC 73-214-P), dated November 15, 1974, dismissing an Application for

[1] Old Ben Coal Corporation changed to Old Ben Coal Company per Notification of Amendment and Request for Correction of Records to Reflect Current Status of Old Ben Coal Company, a Division of Sohio Petroleum Company filed with the Board on April 9, 1975, by Old Ben.

Review of a section 104(a) Order of Withdrawal pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969,[2] (hereinafter the "Act,") and assessing civil penalties in the amount of $70,000 for seven violations pursuant to section 109 of the Act.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Extensive accumulations of loose coal, coal dust, and float coal dust in the presence of potential sources of ignition will support a finding of imminent danger.

2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Notice and Service

An operator must be given fair notice adequate to enable it to determine with reasonable certainty the type and number of violations charged by MESA as the basis for assessment of penalties.

3. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Incombustible Contents

Where an Administrative Law Judge finds that the methods for testing incombustible content of samples are reliable, results obtained by such methods indicating insufficient incombustible content will support a finding of violation of 30 CFR 75.403.

4. Federal Coal Mine Health and Safety Act of 1969: Penalties: Amounts

In a section 109 *de novo* proceeding, an Administrative Law Judge may determine an amount of civil penalty for violations charged and found to have occurred higher than that proposed by the MESA Assessment Office for such violations where such determination is based upon consideration of the statutory criteria and findings which justify his assessments.

APPEARANCES: Thomas H. Barnard, Esq., and Michael C. Hallerud, Esq., for appellant, Old Ben Coal Company; Richard V. Backley, Esq., Assistant Solicitor, and Michael V. Durkin, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On August 28, 1972, at about 9:30 a.m., a Mining Enforcement and Safety Administration (MESA) inspector, during a regular inspection of Old Ben Coal Company's (Old Ben) No. 24 mine in Franklin County, Illinois, found conditions in violation of the mandatory health and safety standards of the Act and regulations, and which he believed presented an "imminent danger" as defined in section 3(j) of the Act (30 U.S.C. § 802(j) (1970)). He thereupon issued Order of Withdrawal No. 1 JLT pursuant to section 104(a) of the Act in which he described the conditions as follows:

Accumulations of loose coal and coal dust and coal float dust were present on 61 north belt conveyor entry ribs and

[2] 30 U.S.C. §§ 801–960 (1970).

floors and adjoining crosscuts for a distance of 400 feet from No. 2 belt drive inby and under and around the tailpiece of 61 north belt. This above-mentioned condition was recorded in the examiner's book. The 14 west belt entry from headroller to belt drive had coal float dust (distinct black) on rockdusted surfaces for a distance of 100 feet; also fine coal under belt drive. Accumulations of coal dust up to 7 inches in depth along north rib of 14 west belt entry for 60 feet outby spad 545 and inby to the 685 tag was fine coal underneath the belt. Accumulations at 685 dumping station from 2 feet to 6 inches in depth covering an area of 20 feet long; also spillage on both sides of tailpiece up to 36 inches in depth.

Rockdust applications were obviously inadequate from 685 to 955 station on 13 and 14 west entries off 61 north. These applications were applied by hand and little or no rockdust was present in numerous areas.

Loose coal and coal dust was [sic] present along ribs and floor at isolated locations and in the cross-cuts of 13 and 14 west entries at 855 and 819 stations ranging from 3 to 8 inches.

Samples were collected to substantiate these findings.

The Order was served upon the appellant's assistant mine manager and required the operator to withdraw all personnel from specified areas except those authorized to remain pursuant to section 104(d) of the Act (30 U.S.C. § 814(d) (1970)). The Order was terminated by the inspector at about 12:15 a.m. on August 29, 1972, the conditions cited having been abated.

The appellant, Old Ben, filed a timely Application for Review of the Withdrawal Order pursuant to section 105 of the Act (30 U.S.C. § 815). MESA and the United Mine Workers of America (UMWA) filed answers in opposition and the matter was set for hearing. Prior to the hearing, Old Ben also filed a timely Petition, pursuant to 30 CFR 100.3(h),[3] for Hearing and Formal Adjudication of an Amended Proposed Order of Assessment issued to it by the MESA Assessment Office, which in pertinent part appeared as follows:

Violation No.	*Date issued*	*Violation*	*Assessment*
1 JLT	08-28-72	104(a) 75.400 75.403	$6,500

On December 3, 1973, the Judge ordered the Application for Review of the Order (Docket No. VINC 73-96) and penalty assessment proceeding (Docket No. VINC 73-214-P) to be consolidated for hearing pursuant to section 109(a)(3) of the Act (30 U.S.C. § 819(a)(3) (1970)). Thereafter a consolidated hearing on these matters was held in January 1974, at which the parties (UMWA did not appear) offered evidence in support of and in opposition to both the Application for Review and the penalty assessment proceeding. At the conclusion of the hearing, both Old Ben and MESA submitted proposed findings and supporting briefs. (The UMWA did not participate and

[3] 37 FR 11460 (June 8, 1972).

offered no information in the review portion of the hearing.) On November 15, 1974, the Judge issued his initial decision and order in the consolidated proceedings in which he found that the 104(a) Withdrawal Order was validly issued; that the conditions cited in the Order did exist and constituted six separate violations of section 304(a) of the Act (30 CFR 75.400) and one violation of section 304(d) of the Act (30 CFR 75.403); that a civil penalty of $10,000 for each of the seven violations was warranted; and ordered Old Ben to pay a total assessment of $70,000.

Old Ben filed a timely Notice of Appeal to this Board from the Judge's decision. The UMWA filed a Motion for Leave to Intervene as a party in interest in the penalty portion of the case which was denied by the Board for failure by the UMWA to make any showing that its participation would assist in resolution of the issues on that portion of the appeal.[4] The Board subsequently ordered that the UMWA be dismissed as a party in the Application for Review portion of the appeal for the reason that it had not participated or offered any information in the proceedings below, but granted UMWA leave to file a brief as *amicus curiae* in the review portion of this appeal.[5] The UMWA elected not to do so.

Oral argument limited to the civil penalty proceeding was held before the Board on April 4, 1975.

Issues Presented

Whether conditions cited in the Order constituted imminent danger.

Whether Old Ben was given adequate notice that it was being charged with and might be assessed for six violations of 30 CFR 75.400 and one violation of 30 CFR 75.403.

Whether violations of 30 CFR 75.400 and 30 CFR 75.403 were established by MESA.

Whether the amount of the penalties assessed by the Judge was appropriate in light of the evidence adduced at the hearing.

Discussion

I.

The Application for Review of the Order of Withdrawal

(Docket No. VINC 73-96)

[1] Although Old Ben concedes in its brief that many of the conditions existing at the time the Order was issued are not in dispute, its principal contention is, in effect, that, even admitting all of the conditions found by the inspector, there was not "imminent danger." In essential part, Old Ben's argument is that the cited accumulations of combustible materials were not hazardous in the absence of actual sources of ignition. We have carefully reviewed the entire record, including the relevant portions of Old Ben's

[4] See 43 CFR 4.513.

[5] *Memorandum Opinion and Order Denying Motions for Summary Dismissal and Motions to Strike*, 4 IBMA 104, 82 I.D. 160 (1975).

post-hearing brief on this question, and conclude that there is sufficient evidence to support the Judge in his finding of imminent danger (Judge's Decision p. 28, hereinafter Dec. 28). We stated in *Eastern Associated Coal Corporation*, 2 IBMA 128, 136, 80 I.D. 400, 1971–1973 OSHD par. 16,187 (1973) that "an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if *normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.*" (Italics added.) This statement was affirmed *per curiam* by the United States Court of Appeals for the Fourth Circuit, in *Eastern Associated Coal Corp.* v. *Interior Board of Mine Operations Appeals, et al.*, 491 F.2d 277, 278 (4th Cir. 1974). In the instant case it required more than 12 hours to clean up the accumulations. We have also previously held that accumulations of loose coal and coal dust together with *potential* sources of ignition will support a finding of imminent danger, *see Old Ben Coal Corporation*, 3 IBMA 282, 81 I.D. 440, 1973–1974 OSHD par. 18,299 (1974).[6] The record in the instant case shows that there were potential sources of ignition, *i.e.*, an energized continuous miner, two energized shuttle cars, and their respective trailing cables. Consequently, we find, as did the Judge, that the MESA inspector acted in a reasonable and prudent manner in issuing the Withdrawal Order. *Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, 1973–1974 OSHD par. 16,567 (1973), *aff'd*, 504 F.2d 741 (7th Cir. 1974). Accordingly, we affirm the Judge's findings and conclusion that the conditions cited in the Order did exist and constituted an imminent danger (Dec. 19–22, 27–28). Therefore, we hold this Order to be valid.

[6] This case was appealed by Old Ben to the United States Court of Appeals for the Seventh Circuit, No. 74–1655.

II.

The Assessment of Civil Penalties

(Docket No. VINC 73–214–P)

A.

Adequacy of Notice

The Board is first concerned with Old Ben's argument on appeal that it was at no time apprised of the basis upon which penalty assessments would be sought. Old Ben contends that inasmuch as the conditions listed by the inspector in the Withdrawal Order were not labeled with specific sections of the Act or regulations alleged to have been violated, it did not receive adequate or proper notice of what violations, if any, might later be charged by MESA as a basis for seeking assessment of civil penalties. Old Ben further contends that the Proposed Order of Assessment subsequently served on it by the Assessment Office of MESA likewise was inadequate in that, with respect to the Withdrawal Order here involved, it con-

tained only an unexplained notation of "75.400" and "75.403" and a proposed lump-sum assessment of $6,500.

Old Ben argues that at no time thereafter, either prior to or during the course of the hearing, was it provided with any more specific charges either as to the type or number of violations on which penalties were being sought, and asserts that the first inkling it received that it was charged with, let alone assessed for, six violations of 30 CFR 75.400 was when it received the Judge's written decision. We agree with Old Ben that this raises a serious question of administrative due process with respect to adequate notice.

We look first to the conditions, quoted *supra* at p. 201, 82 I.D. at 265, described by the inspector in the Withdrawal Order served upon Old Ben. We have heretofore held in *Eastern Associated Coal Corporation*, 1 IBMA 233, 235, 79 I.D. 723, 1971–1973 OSHD par. 15,388 (1972), that:

> In general this Board finds no violation of due process where conditions or practices described in an order of withdrawal do not specify a particular section of the Act or mandatory standard violated. * * * We believe as a general proposition that where an alleged violation is sufficiently described to permit abatement, adequate notice of the condition is established.

We have also recognized, and held since the beginning of enforcement of the Act in 1970, that monetary penalties cannot be assessed on a Withdrawal Order alone since such Orders may be issued upon an inspector's finding of conditions which he believes constitute imminent danger, but which may or may not be violations of the Act or regulations, *Eastern Associated Coal Corporation, supra*, at 1 IBMA 236, 79 I.D. at 726 (1972). We have also consistently held, however, that if the condition recited in such order does spell out a violation, such citation in an Order is equivalent to issuing a notice of violation under section 104(b) of the Act, *Eastern Associated Coal Corporation, supra*, at 235. In all cases, however, we believe it essential in implementing the Act and procedural regulations, that the operator be timely and sufficiently apprised by MESA to enable it to determine with reasonable certainty the allegations of violations charged so that it may intelligently respond thereto and decide whether it wishes to request formal adjudication. Failure to so apprise an operator would be violative of administrative due process, and the requirement of the Administrative Procedure Act, 5 U.S.C. § 554(b) (1970), that:

> Persons entitled to notice of an agency hearing shall be timely informed of * * * (3) the matters of fact and law asserted. * * *

[2] With the foregoing in mind, it is our opinion that the description of the conditions cited in the Withdrawal Order issued in the instant case was sufficiently clear to apprise the operator with reasonable certainty that the inspector was citing violations of section 304(a) of the Act (30 CFR 75.400) and sec-

tion 304(d) of the Act (30 CFR 75.403). Additionally, the proposed order of assessment which listed the two sections of the regulations alleged to have been violated and which accurately fit the conditions described in the Order, likewise put Old Ben on notice that these were the two sections directly applicable and for which penalties were being sought.

Under the penalty assessment procedural regulations in effect at the time (30 CFR 100.3(h) and 43 CFR 4.540–541) we note that upon rejection of a proposed order of assessment issued by the Assessment Office, the operator was required to file a timely Petition for Hearing and Formal Adjudication. Old Ben filed such a petition which contained a list of the violations it wished to contest, including the two citations of the regulations (30 CFR 75.400 and 75.403) for which a lump-sum penalty of $6,500 was proposed. Again it seems clear to the Board that Old Ben was adequately apprised of and intended to place in issue the alleged violations of these two sections. While the Assessment Office was in error for proposing a lump sum instead of separate amounts, inasmuch as Old Ben clearly rejected the entire proposal and requested *de novo* hearing on the assessment, we do not believe that this error deprived Old Ben of fair notice of the matters of fact and law to be asserted at such hearing. Therefore, we conclude that Old Ben was adequately apprised and understood the fact that it was being charged by MESA with violation of the two sections cited as the basis for assessment of penalty.

The ultimate finding by the Judge of six separate violations of 30 CFR 75.400, however, presents a more serious question. The record is clear that at no time, either prior to or during the course of the hearing, was Old Ben put on notice that it was being charged with six separate violations of 30 CFR 75.400. Although section 109(a)(1) of the Act provides that each occurrence of a violation of a mandatory health or safety standard *may* constitute a separate offense, Old Ben was never notified that it was MESA's intention to so charge. The record reveals that Old Ben had no way of knowing either before or during the hearing that the Judge in his decision would split the charge of violating this section into six separate occurrences and assess a maximum penalty of $10,000 for each such offense. We hold that this was error and cannot be permitted to stand.

In his initial decision the Judge stated at page 12, footnote 12:

> * * * Since the operator was charged with knowledge and notice that each of the conditions cited was a violation of 30 CFR 75.400 and, in fact, conducted cross-examination and/or presented extensive evidence as to each separate condition, there was no prejudice to its right to a full and fair hearing with opportunity to defend. It is now well settled that there may be no subsequent challenge to the adequacy of a notice and hearing, if there was actual notice with opportunity to cure any surprise and thereafter the issues raised were actually litigated. *Eastern Associated Coal Corp.*, Decision

of March 7, 1974, Docket Nos. 73-567, 73-618, p. 13, and cases cited therein. See also, *NLRB* v. *Mackay Co.*, 304 U.S. 333, 349-351 (1938). Compare, *NLRB* v. *Tennsco Corp.*, 339 F.2d 396, 399 (6th Cir. 1964).

We cannot agree with the Judge's holding that *actual* notice of the six separate charges of violation of 30 CFR 75.400 was given in this case. Irrespective of the fact that evidence was taken as to each condition described in the Order, at no time did MESA allege that it was seeking to assess penalties for separate occurrences of the alleged violation, nor did the Judge indicate that he understood MESA to be charging separate offenses or might himself find and assess penalties on six separate occurrences in rendering his decision. On the contrary, the record indicates that Old Ben concluded at the hearing, and we think reasonably, that the order and manner in which evidence was taken was for the purpose of considering and determining the factors of whether the operator was negligent, the gravity of the violation, and good faith in attempting to achieve rapid compliance after notification of the violation (30 U.S.C. § 819(a)(1) (1970)). Our view on this is strengthened by the fact that, even on appeal, MESA does not allege that it had ever intended to charge six separate violations nor that it understood this was the intention of the Judge. Obviously, it is a vital part of any penalty proceeding for a mine operator to know how many separate violations of the Act or regulations it is charged with, particularly when it may be held liable for penalties up to $10,000 for each violation. In sum we hold that the record in this case will not support a finding that Old Ben had actual notice and adequate opportunity to prepare for six separate violations of 30 CFR 75.400.

We find, therefore, that although Old Ben had adequate notice that it was being charged with violating 30 CFR 75.400, it did not have notice that it was being charged with six separate violations of this regulation. We think it entirely reasonable to surmise that if Old Ben had been placed on notice by MESA from the outset that it was being charged with six violations of 30 CFR 75.400, its defense might well have been of a different character. In any case, we find that the Judge erred and exceeded his authority in taking it upon himself to split the charge into six separate violations. It is the exclusive province of the prosecutorial arm of the Secretary, MESA, to elect the specific charge or charges to be brought against an operator and to seek penalties thereon. *Freeman Coal Mining Corporation*, *supra*, 2 IBMA 197, at 210, 80 I.D. 610. Consequently, we hold that there was a failure of adequate notice and error in finding and assessing penalties on six separate violations of 30 CFR 75.400. However, we also hold that the record does support a finding that Old Ben was adequately notified of one violation of 30 CFR 75.400 and one violation of 30 CFR 75.403 as the basis upon

which assessments were being sought.

B.

Fact of Violation

At the outset we note that Old Ben contends that no violation of 30 CFR 75.400 could be found because this regulation was invalidated by the decision in *United States* v. *Finley Coal Company*, 493 F.2d 285 (6th Cir. 1974). We cannot agree. We previously held in *Union Carbide Corporation*, 3 IBMA 314, 317, 81 I.D. 531, 1974–1975 OSHD par. 18,667 (1974) that:

> [The decision in Finley] does not apply to 30 CFR 75.400 which is a mere restatement of sec. 304(a) of the Act requiring that coal and coal dust, as well as other combustibles be cleaned up and not permitted to accumulate. Since it is section 75.400, * * * which was found to be violated in the present case, *Finley* is no bar to enforcement. (Footnote omitted.)

We reaffirm our holding in *Union Carbide*, *supra*, and hold that it is dispositive of this contention.

30 CFR 75.400

Old Ben has conceded that the conditions cited by the inspector existed at the time of his inspection, but contends that they were not "accumulations" of a character proscribed by this regulation. The statutory provision, section 304(a) of the Act, is identical to the regulation and provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

We have carefully examined the testimony of the witnesses for MESA and Old Ben on this point and affirm the findings and conclusions of the Judge that the evidence presented by MESA preponderates (Dec. 6–16, 27). Consequently, we hold that a violation of this standard did, in fact, occur.

30 CFR 75.403

Here again the statutory provision, section 304(d) of the Act, is identical to the regulation and provides as follows:

> Where rock dust is required to be applied, it shall be distributed upon the top, floor, and sides of all underground areas of a coal mine and maintained in such quantities that the incombustible content of the combined coal dust, rock dust, and other dust shall be not less than 65 per centum, but the incombustible content in the return aircourses shall be no less than 80 per centum. Where methane is present in any ventilating current, the per centum of incombustible content of such combined dusts shall be increased 1.0 and 0.4 per centum for each 0.1 per centum of methane where 65 and 80 per centum, respectively, of incombustibles are required.

[3] Old Ben's principal contention on this charge is that the testing methods employed by MESA in order to determine the incombustible content of samples collected by the inspector are unreliable and therefore cannot support the finding by the Judge of a violation of this standard. At the hearing, Old Ben advanced the same arguments as it does on appeal. We find nothing new which would lead

us to a different conclusion than that reached by the Judge. The record reveals that the Judge considered all of the evidence submitted by both parties and concluded that Old Ben had failed to overcome the evidence presented by MESA that the testing methods employed by MESA were sufficiently reliable to admit the results obtained therefrom into evidence of the cited violation. *See Co-Op Mining Company*, 3 IBMA 533, 81 I.D. 780, 1974–1975 OSHD par. 19,162 (1974). We find no error in the Judge's findings and conclusion that the weight of the evidence submitted was on the side of MESA. (Dec. 28–39.)

C.

Application of the Section 109(a)(1) Criteria in Determining Amount of Penalty

[4] Our following discussion of the Judge's application of the statutory criteria in determining the amount of the penalties assessed is limited to those matters which in our view require modification of the Judge's findings and conclusions. Except as otherwise indicated herein, we affirm the Judge's findings and conclusions (Dec. 6–16, 27, 39).

Appropriateness of Penalty to Size of Business and Effect on Operator's Ability to Continue in Business

On appeal, Old Ben contends that the Judge improperly took into account in his decision profit and revenue data derived from the Wall Street Journal, the New York Times, and the United Mine Workers Journal which pertain to the fiscal position of Sohio — the parent company of Old Ben. Old Ben's objection is three-fold: first, that it had no indication during the course of the hearing that such data would be used; second, that the data was clearly hearsay and as such inadmissible; and third, that there is no relationship between the parent company (Sohio) and Old Ben which would justify any consideration by the Judge of Sohio's fiscal position in determination of the appropriateness of a penalty to the size of the business of the operator of the mine. We agree with Old Ben that the Judge clearly erred in taking these fiscal data into account in determining the amount of penalty. However, in our view of the case, the error was harmless. The record supports the fact that Old Ben Coal Company, standing alone, is one of the largest coal producers in the United States and employs approximately 300 men on three production shifts at No. 24 mine. Additionally, at the hearing, Old Ben stipulated that payment of the proposed penalty of $6,500 would not have adversely affected its ability to continue in business; and at oral argument, counsel for Old Ben stated that although the maximum penalty of $70,000, assessed by the Judge, would have some economic impact on Old Ben, it would not deter its continuance in business. In reaching our conclusion, we are considering only the size of the Old Ben Coal Company and its operation of the

No. 24 mine, and have disregarded any other fiscal data pertaining to its parent company and other operations. Accordingly, we hold that the amount of the penalty assessed herein is appropriate when considering the size of the business of the operator charged, and further that it will not adversely affect the operator's ability to continue in business.

Operator's History of Previous Violations

It is Old Ben's contention that in giving consideration to an operator's history of previous violations, as required under section 109(a)(1) of the Act, such consideration must be confined only to those violations admitted by the operator for which penalties have been paid, and/or those adjudged to have been established by MESA by formal adjudication in the Office of Hearings and Appeals. Old Ben further contends that alleged violations for which an operator has paid an informally proposed assessment, or those on which penalties were paid as a result of compromise or settlement with the Solicitor, cannot properly be considered a part of the operator's history of previous violations. We have previously held in *Corporation of the Presiding Bishop, Church of Jesus Christ of the Latter-Day Saints*, 2 IBMA 285, 80 I.D. 663, 1973-1974 OSHD par. 16,913 (1973), that violations for which the operator has paid the proposed assessment, even under protest, may properly be considered as part of the history of previous violations. We are also of the opinion and so hold that violations on which proposed assessments have been paid by way of compromise or settlement with the Solicitor may also be considered as part of the history. We agree with Old Ben, however, that alleged violations which have not been processed through the Assessment Office or are in a stage of being litigated within the Office of Hearings and Appeals should be excluded from consideration. In the instant case, the record shows that Old Ben had paid assessments on 18 violations of section 304(a) of the Act and 11 violations of section 304(d) cited within the 19-month period prior to the issuance of the instant Order. Restricting our consideration to these 29 violations alone, we believe a history has been established sufficient to support the Judge's conclusion that repeated violations of these sections of the Act justify a higher penalty than theretofore assessed as a method of deterring future violations of these standards (Dec. 27).

Good Faith in Attempting to Achieve Rapid Compliance

In his decision the Judge concluded that Old Ben failed to demonstrate good faith in achieving rapid compliance after the Withdrawal Order was issued. This conclusion was based upon testimony of the issuing inspector to the effect that he believed the conditions listed in the Order could have been abated within five hours whereas he

was not called back for a reinspection to determine whether the Order should be lifted until more than 12 hours had elapsed after issuance. The Board notes that it was in Old Ben's best interest to clean up the cited conditions as rapidly as possible in order that it might resume normal mining operations and production of coal. We also note that the Order closed a large area of the mine, and that the record indicates Old Ben assigned such personnel as it had available to bring about compliance. Consequently, although it may appear that abatement of the conditions might have been achieved with greater rapidity, we are unable to agree with the Judge that there was any showing of bad faith or lack of good faith in abating the conditions. We do not believe, however, that our view of Old Ben's good faith compliance is sufficient, standing alone, to mitigate the amount of the penalty assessed herein, particularly since we are affirming the Judge's findings on the other criteria, including those of gravity and negligence (Dec. 6–16, 39).

Other Considerations

Old Ben contends that most penalties assessed in circumstances similar to those presented in the instant case have ranged from under $100 to $2,000 and asserts that approval of this range of assessments by this Board clearly indicates the reasonable perimeters within which penalties may be assessed. Old Ben further argues that while the Act does not specifically so require, comparability, uniformity and national consistency should be sought. In this connection Old Ben cites a decision assessing civil penalties under the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 651 *et seq.*, *Chamberlain Mfg. Corp.*, 1974–1975 OSHD par. 19,181 (Jan. 7, 1975), in which the Occupational Safety and Health Review Commission (Review Commission) affirmed the decision of an Administrative Law Judge who had sharply reduced civil penalty assessments in an effort to achieve some uniformity and national consistency.

We agree that there is merit in attempting to bring about some uniformity and consistency in the assessment of penalties in similar circumstances, and do our best to achieve this under our penalty assessment procedures. However, just as the same or different Judge in the same or different court of law may hand down a lighter or harsher penalty in what may appear to be similar circumstances, the Administrative Law Judge must determine the amount of a civil penalty after consideration on a case-by-case basis of all the evidence properly before him. It has been the policy of this Board in reviewing penalty assessment cases to uphold the Judges' assessments where they meet this test unless a compelling reason has been presented to change them. In the instant appeal we find no such compelling reason.

In the OSHA case cited by Old Ben, *supra*, we note that the Review

Commission simply affirmed the decision of an Administrative Law Judge who had reduced a penalty assessment. In the case at hand, the Judge increased the amount of the assessment proposed by the Assessment Office for reasons set forth in his decision and which we believe are adequate to support the increase.

We cannot agree with Old Ben's contention that there is nothing in the record of this case to suggest that a penalty should have been assessed in the upper reaches of the maximum permitted, let alone the maximum of $10,000 for each of the violations found. As we have hereinabove stated, we are of the opinion that with the exception of good faith in compliance the Judge properly considered and evaluated the evidence adduced by testimony in reaching his determination. We think the gravity of the violations, when considered with the operator's history of previous violations of the same standards, justified a stronger deterrent than heretofore imposed for violations of these standards. From the outset of enforcement of the Act and the establishment of the Office of Hearings and Appeals, it has been the policy and published procedure of this Department that section 109(a) hearings are *de novo*, 43 CFR 4.545. The operators of mines have been on notice from the beginning that if they elect to reject the informal proposal for assessment of penalty made by the Assessment Office and instead elect to have a formal adjudication, the Judge may determine any amount of penalty, not more than $10,000 for each violation, upon proper consideration of the evidence and criteria set forth in section 109(a)(1) of the Act. In many such adjudications, the Judge has determined that an amount either higher or lower than that proposed was appropriate, and in many of these cases the amount proposed by the Assessment Office was not made a part of the record and was unknown to the Judge.

Based upon our review of the entire record and our consideration of the criteria of section 109(a)(1) of the Act, we hold that a penalty of $10,000 for each of the two violations charged is justified in order to penalize the operator for the violations and to deter it from future violations, the latter being one of the principal intentions of Congress in mandating that civil penalties be assessed for each violation. As stated hereinabove, we have found and hold that one violation of 30 CFR 75.400 and one violation of 30 CFR 75.403 were charged and occurred.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in the above-captioned case IS AFFIRMED except as modified herein. IT IS FURTHER ORDERED that Old Ben Coal Company pay the penalties assessed, in the total amount of

$20,000, within 30 days from the date of this decision.

C. E. ROGERS, JR.,
Chief Administrative Judge.

WE CONCUR:

DAVID DOANE,
Administrative Judge.

JAMES R. RICHARDS,
Ex-officio Member of the Board.
Director,
Office of Hearings and Appeals.

OLD BEN COAL COMPANY [1]

4 IBMA 224

Decided *June 6, 1975*

Appeal by Old Ben Coal Company from a decision in a consolidated section 105 and section 109 proceeding by Administrative Law Judge Joseph B. Kennedy (Docket Nos. VINC 73-150 and VINC 73-215-P), dated November 22, 1974, denying an Application for Review of a section 104(a) Order of Withdrawal pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969,[2] hereinafter the "Act," and assessing civil penalties in the amount of $20,000 for three violations pursuant to section 109 of the Act.[3]

Affirmed as Modified.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

Extensive accumulations of loose coal and coal dust in the presence of a damaged trailing cable will support a finding of imminent danger.

2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Notice and Service

An operator must be given fair notice adequate to enable it to determine with reasonable certainty the type and number of violations alleged by MESA as the basis for assessment of penalties.

3. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

An Administrative Law Judge is required by 5 U.S.C. § 556 (1970) to conduct a hearing in a strictly impartial manner, not as a representative of an investigative or prosecuting authority.

4. Federal Coal Mine Health and Safety Act of 1969: Penalties: Existence of Violation: Generally

A violation of 30 CFR 75.517 is established where it is shown that the outer protective insulating jacket of a trailing cable is cut through to the extent that the inner phase lead insulation is exposed.

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[1] Old Ben Coal Corporation changed to Old Ben Coal Company per Notification of Amendment and Request for Correction of Records to Reflect Current Status of Old Ben Coal Company, a Division of Sohio Petroleum Company filed with this Board on April 9, 1975, by Old Ben.

[2] 30 U.S.C. §§ 801-960 (1970).

[3] Many of the issues presented in the instant appeal are very similar or identical to those in *Old Ben Coal Co.*, 4 IBMA 198 (IBMA 75-17), 82 I.D. 264 (1975), decided and issued by the Board on this same date. The civil penalty portions of both cases were consolidated for the purpose of oral argument before the Board. However, inasmuch as separate hearings were held below and separate initial decisions issued, the Board has also issued a separate decision in each case on appeal. In doing so, it should be noted that insofar as issues common to both cases are discussed at some length in 4 IBMA 198, *supra*, it has been unnecessary to repeat such treatment herein. Therefore, the two opinions should be read in sequence for an understanding of the Board's resolution of these issues.

5. Federal Coal Mine Health and Safety Act of 1969: Penalties: Amounts

In a section 109 *de novo* proceeding, an Administrative Law Judge may determine an amount of civil penalty for violations charged and found to have occurred higher than that proposed by the MESA Assessment Office for such violations where such determination is based upon consideration of the statutory criteria and findings which justify his assessments.

APPEARANCES: Michael C. Hallerud, Esq., and Thomas H. Barnard, Esq., for appellant, Old Ben Coal Company; Richard V. Backley, Esq., Assistant Solicitor, and Michael V. Durkin, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On October 3, 1972, at about 8:55 a.m., a Mining Enforcement and Safety Administration (MESA) inspector, during a regular inspection of the appellant's, Old Ben Coal Company (Old Ben), No. 24 Mine, in Franklin County, Illinois, found conditions in violation of the mandatory health and safety standards of the Act and regulations, and which he believed presented an "imminent danger" as defined by section 3(j) of the Act. He thereupon issued Order of Withdrawal No. 1 MC, pursuant to section 104(a) of the Act in which he described the conditions as follows:

> Accumulations of loose coal and coal dust were present on the Roadway on the 36 north entry at station split 2,799 outby for a distance of *105 feet* averaging in depth from 3 inches too (sic) 8 inches. The rock dust application was obviously inadequate on the ribs, top, and floors in split 2,799 inby for a distance of *80 feet* and on the 36 north entry from split 2799 outby for a distance of *125 feet*. Four rock dust survey samples were collected to substantiate the order. The trailing cable on the Joy continuous miner had *four* places in the cable that the phase leads was showing and *seven* places that the insulations was (sic) not adequate.

The Order was served upon Old Ben's face foreman and required the operator to withdraw all personnel from the specified areas except those authorized to remain pursuant to section 104(d) of the Act. The order was terminated by the inspector at 10:55 a.m., on October 3, 1972, the conditions cited having been abated.

Old Ben filed a timely Application for Review of the Order pursuant to section 105(a)(1) of the Act. MESA and the United Mine Workers of America (UMWA) filed answers in opposition and the matter was set for hearing. Prior to the hearing, Old Ben also filed a timely Petition, pursuant to 30 CFR 100.3(h),[4] for Hearing and Formal Adjudication of an amended proposed order of assessment issued to it by the MESA Assessment Office, which in pertinent part appeared as follows:

[4] 37 FR 11460 (June 8, 1972).

Violation No.	Date Issued	Violation	Assessment
1 MC	10-03-72	104(a)75. 400 75. 517	$6,100

On December 3, 1973, the Administrative Law Judge (Judge) ordered the Application for Review of the Order (Docket No. VINC 73-150) and penalty assessment proceeding (Docket No. VINC 73-215-P) consolidated for hearing pursuant to section 109(a)(3) of the Act. Thereafter, a consolidated hearing on these matters was held on January 9, 1974, at which the parties (UMWA did not appear) offered evidence in support of and in opposition to both the Application for Review and the penalty assessment. At the conclusion of the hearing, both Old Ben and MESA submitted proposed findings and supporting briefs. (The UMWA did not participate and offered no information in the review portion of the hearing.) On November 22, 1974, the Judge issued his decision and order in the consolidated proceeding in which he found that the section 104(a) Order was validly issued; that the conditions cited in the Order did exist and constituted one violation of section 304(a) of the Act (30 CFR 75.400) and two violations of section 305(1) of the Act (30 CFR 75.517); that a civil penalty of $10,000 for the violation of 30 CFR 75.400 and $5,000 for each violation of 30 CFR 75.517 were warranted; and ordered Old Ben to pay a total assessment of $20,000.

Old Ben filed a timely Notice of Appeal to this Board from the Judge's decision. The UMWA filed a Motion for Leave to Intervene as a party in interest in the penalty portion of the case which was denied by the Board for failure of the UMWA to make any showing that its participation would assist in resolution of the issues in that portion of the appeal.[5] The Board also dismissed the UMWA as a party in the Application for Review portion of the appeal for the reason that it had neither participated nor offered any information in the proceeding below. The Board did, however, grant UMWA leave to file a brief as *amicus curiae* in the review portion of this appeal,[6] but the UMWA elected not to do so.

Oral argument limited to the assessment of civil penalty was held before the Board on April 4, 1975.

Issues Presented

Whether the conditions cited in the Order constituted imminent danger.

Whether Old Ben received adequate notice that it was being charged with and might be assessed for two violations of 30 CFR 75.517

[5] See 43 CFR 4.513.

[6] *Memorandum Opinion and Order Denying Motions for Summary Dismissal and Motions to Strike*, 4 IBMA 104, 82 I.D. 160, 1974-1975 OSHD par. 19,511 (1975).

and one violation of 30 CFR 75.400.

Whether the Judge's conduct during the hearing had a prejudicial effect on Old Ben's right to a fair hearing and decision.

Whether violations of 30 CFR 75.517 and 75.400 were established.

Whether the amount of penalties assessed by the Judge was appropriate in light of the evidence adduced at the hearing.

Discussion

I.

Application for Review

(Docket No. VINC 73-150)

[1] Although Old Ben concedes in its brief that the conditions existing at the time the Order was issued are not in dispute, its principal contention is, in effect, that even admitting all of the conditions found by the inspector, there was no "imminent danger." Old Ben's argument is that the cited accumulation of loose coal and coal dust was not hazardous in the absence of actual sources of ignition, that the results of testing the four samples of rock dust were invalid, and that the trailing cable, even in the condition cited, was not hazardous, and thus, there could be no imminent danger. We have carefully reviewed the entire record on this question and conclude that there is sufficient evidence to support the Judge in his finding of imminent danger (Judge's Decision 21-24, hereinafter Dec. 21-24). We stated in *Eastern Associated Coal Corporation*, 2 IBMA 128, 136, 80 I.D. 400, 1971-1973 OSHD par. 16,187 (1973) that "[a]n imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner if *normal mining operations were permitted to proceed in the area before the dangerous condition is eliminated.*" (Italics added.) This statement was affirmed *per curiam* by the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp.* v. *Interior Board of Mine Operations Appeals, et al.*, 491 F.2d 277 (4th Cir. 1974). We have also held that accumulations of loose coal and coal dust together with *potential* sources of ignition will support a finding of imminent danger. *Old Ben Coal Corporation*, 3 IBMA 282, 81 I.D. 440, 1973-1974 OSHD par. 18,299 (1974). The record in the instant case shows that there were potential sources of ignition, *i.e.*, the continuous miner and its damaged trailing cable, and that the dust samples contained an insufficient percentage of incombustible material. Consequently, we find, as did the Judge, that the MESA inspector acted in a reasonable and prudent manner in issuing the Order of Withdrawal. (*Freeman Coal Mining Corporation*, 2 IBMA 197, 80 I.D. 610, 1973-1974 OSHD par. 16,567 (1973) *aff'd.*, 504 F.2d 741 (7th Cir. 1974)). Accordingly, we affirm the Judge's findings and conclusion that the conditions cited in the Order did exist and constituted an imminent danger (Dec. 12-13,

21–24). Therefore, we hold this Order to be valid. *See also, Old Ben Coal Company*, 4 IBMA 198, 82 I.D. 264, 1974–1975 OSHD par. 19,723 (1975).

II.

The Assessment of Civil Penalties

(Docket No. VINC 73–215–P)

A.

Adequacy of Notice

[2] The factual situation in the instant case is almost identical to that in *Old Ben, supra*, with respect to the issue of adequate notice being given of two alleged violations of 30 CFR 75.517. We believe the conclusion reached in that case is dispositive of that issue in the instant case. Accordingly, we hold that Old Ben was not given adequate notice of two violations and may be liable for only one violation of 30 CFR 75.517. We further hold that Old Ben was given adequate notice of one alleged violation of 30 CFR 75.400.

B.

Impartiality of the Judge

The Board is concerned with the allegations made by Old Ben in its brief on appeal with respect to the conduct of the Judge during the hearing, particularly with the statement appearing at page 14 in its brief that:

> The conduct of the hearing was so prejudicial, as an examination of the record indicates, that the Appellant was denied a fair opportunity to present its case.

Old Ben's objection on this point appears under its discussion of the Judge's findings of gross negligence of the operator, at pages 14 through 19 of its brief. At page 16 of the brief, Old Ben further states:

> While the record obviously does not so reflect, this entire rapid sequence of bench examination was conducted by the Administrative Law Judge from a standing position, hovering over the witness, with arms flailing! It could not be reasonably maintained that these questions were properly directed from the bench for clarification purposes. When attempts were subsequently made to cross-examine this "testimony" and state for the record the style by which the examination was conducted, the Administrative Law Judge again interferred, conducting what amounted to rehabilitative redirect *during* cross-examination: * * *

Although we are reading from a cold record, we are nevertheless struck by the tone and tenor of the Judge's conduct during this phase of the hearing which brings into question whether such conduct was so prejudicial as to destroy our confidence in the findings of the Judge, not only on the issue of negligence, but on his other findings here on review.

[3] The Administrative Procedure Act, 5 U.S.C. § 556 (1970), provides in pertinent part that "* * * The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner." The Attorney General's Manual on

the Administrative Procedure Act, in reference to this provision, at page 72, states that "This means, of course, that 'They must conduct the hearing in a strictly impartial manner, rather than as the representative of an investigative or prosecuting authority, but this does not mean that they do not have the authority and duty—as a court does—to make sure that all necessary evidence is adduced and to keep the hearing orderly and efficient.' Sen. Rep. p. 21, H.R. Rep. p. 34 (Sen. Doc. pp. 207, 268). This is not intended to prohibit a hearing officer from questioning witnesses and otherwise encouraging the making of a complete record."

Although we do not condone what appears to be an over-zealous and perhaps injudicious attempt on the part of the Judge to elicit facts from witnesses and in so doing encroach upon the prosecutorial function, we believe that the generally accepted rule on bias of the type here alleged is that strong conviction of a Judge on questions of law and policy does not alone disqualify him from rendering a decision on what he discovered to be the objective truth of the matters before him. 2 Davis, Administrative Law § 12.01 at 133 (1st ed., 1958). The attitude of the Judge may have been aggravated and intensified by the fact that the hearing in the instant case followed close on the heels of the hearing in *Old Ben*, *supra*. Nevertheless, it does appear that the Judge was intimidating the witnesses and putting words in their mouths in order to achieve a predetermined result. Normally, we would be inclined in such circumstances to remand the case to a different Judge for re-trial. However, on the basis of our review of the entire record, and the fact that counsel for Old Ben had full opportunity to make objections at the hearing but failed to do so, we are of the opinion that there was sufficient evidence adduced, untainted by the Judge's conduct to permit us to weigh and give credit to his findings and conclusions as necessary to our disposition of this appeal. In doing so we further observe that during the course of the oral argument before the Board, counsel for Old Ben stated that he believed a fair review by the Board could be conducted on the basis of the record as it stands (Tr. 54). Accordingly, our review has taken into account the conduct of the Judge, and we have reached our decision on the basis of the undistorted evidence of record.

C.

Fact of Violation

30 CFR 75.400

Old Ben has conceded that the conditions cited by the inspector existed at the time of his inspection, but contends that they were not an "accumulation" of the character proscribed by this regulation. The statutory provision, section 304(a) of the Act, is identical to the cited regulation and provides as follows:

Coal dust, including float coal dust deposited on rockdusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

We have carefully examined the testimony of the witnesses for MESA and Old Ben on this point and affirm the findings and conclusions of the Judge that the evidence presented by MESA preponderates (Dec. 7–11, 13–15).

30 CFR 75.517

Here again, the statutory provision, section 305 (*1*) of the Act, is identical to the cited regulation and provides as follows:

Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected.

Old Ben's principal contention on this charge is that so long as the intact inner insulation on the phase leads meets the requirement for adequate insulation, rupture of the outer jacket does not constitute a violation.

[4] The Board believes that Old Ben's contention is unfounded. We believe that a trailing cable is provided for a piece of equipment as a unit with both an inner and outer jacket for the wires contained therein. Although the outer jacket may be made from extremely durable material, we note that such material is also nonconductive and may serve as an additional insulating medium. Further, 30 CFR 75.517 provides that all power wires and cables "* * * shall be * * * fully protected." As the Judge found, phase leads protected only by the inner insulation will be much more prone to cuts and the resulting dangers of electrical shock and short circuits. We believe that the tough outer jacket was intended to protect the leads from such cuts and breaks and is, therefore, required for the cable to be fully protected. Accordingly, we conclude that a trailing cable is an integral unit comprised of conductors, inner and outer insulating and protecting jackets, and that four ruptures of a cable revealing the conductors with only their inner jacket of insulation intact, and seven places on the cable where ruptures had not been repaired to the original thickness of the cable, constitute a violation of 30 CFR 75.517.

D.

Application of the Section 109(a)(1) Criteria In Determining Amount of Civil Penalty

[5] Inasmuch as the Board has considered the assessment of the civil penalty portion of this case together with that same portion of *Old Ben Coal Company*, 4 IBMA 198, *supra*, and both cases involve violations in the same mine, our conclusions with respect to the criteria of size of business, adverse effect of amount of penalty on Old Ben's ability to continue in business, and history of previous violations found in *Old Ben*, *supra* at 216–219, are equally applicable in the instant

case and we therefore adopt them here.

With regard to the remaining criteria of section 109, we believe the Judge's findings and conclusions are supported by the evidence of record and so hold (Dec. 5–6, 15–17, 26–27).

Based upon his findings and conclusions with respect to these six criteria and his determination that a higher than usual penalty was warranted to obtain a deterrent effect, the Judge assessed the maximum amount for the violation of 30 CFR 75.400 and $5,000 for each violation of 30 CFR 75.517. Based upon our consideration of the record and the deterrent nature of penalties, we agree with the Judge's determinations and assessments for the respective violations. However, as stated hereinabove, we have found that only one violation of 30 CFR 75.400 was properly charged, and one violation of 30 CFR 75.517. Consequently, the assessment is limited to these two violations.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in the above-captioned case IS AFFIRMED except as modified herein. IT IS FURTHER ORDERED that Old Ben Coal Company pay the penalties assessed, in the total amount of $15,000, within 30 days from the date of this decision.

C. E. Rogers, Jr.,
Chief Administrative Judge.

We concur:

David Doane,
Administrative Judge.

James R. Richards,
Ex-officio Member of the Board.
Director,
Office of Hearings and Appeals.

HARLAN NO. 4 COAL COMPANY

4 IBMA 241

Decided *June 6, 1975*

Appeal by Harlan No. 4 Coal Company from a decision by Administrative Law Judge George H. Painter in Docket No. BARB 74–136–P wherein he assessed civil penalties in the aggregate sum of $1,150 pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Parties

Where an operator filed legal identity reports under two different corporate names without noting the change, and where, in a proceeding to assess a civil penalty, the notices of violation and the petition for assessment use only one of the names, there is no basis for dismissal for failure to serve and join the corporate alias if

the respondent in fact has defended throughout the administrative proceeding.

APPEARANCES: Wesley C. Marsh, Esq., for appellant, Harlan No. 4 Coal Company; Richard V. Backley, Esq., Assistant Solicitor, Michael V. Durkin, Esq., for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Harlan No. 4 Coal Company (Harlan) appeals to the Board from a decision in Docket No. BARB 74–136–P wherein Administrative Law Judge George H. Painter assessed civil penalties in the aggregate amount of $1,150 for five alleged violations pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 819 (1970). Harlan challenges the decision below in a number of respects, but we conclude that all the assignments of error, save one, are without merit and too insubstantial for extended discussion. The sole exception is Harlan's claim that the Judge erred in holding it liable as a successor to the K.O.K. Coal Company (K.O.K.) for the penalties assessed. Although we agree that the evidence does not provide the factual support for the Judge's theory of successor liability, the record does show that Harlan has also been known as (a/k/a) K.O.K. insofar as the subject mine is concerned. Accordingly, we are setting aside the findings and conclusions of successor liability and affirming the Judge's decision and order in all other pertinent respects except as modified herein.

Procedural and Factual Background

The five subject notices of violation were issued at the Karen Mine in Alva, Kentucky, during September 1972, by federal coal mine inspector Clarence Parsons. In each instance, the operator named was K.O.K. and the person served was Frank Qualls, the mine superintendent.

On October 2, 1973, the Mining Enforcement and Safety Administration (MESA) filed a petition for assessment of civil penalties in the Hearings Division which, like the notices, named K.O.K. The issues were eventually joined on February 8, 1974, when an answer coupled with a request for hearing was filed. This answer was submitted on behalf of K.O.K. by its attorney, James S. Greene, Jr., Esq.

Subsequently, on April 19, 1974, K.O.K., by and through a new attorney, Wesley C. Marsh, Esq., filed a discovery motion for an order to produce. On May 9, 1974, K.O.K. submitted an amended motion to produce in response to the Judge's order to specify.

Following disposition of the pretrial discovery motions, the Judge scheduled a hearing on the merits for June 19, 1974. One day prior to that hearing, K.O.K., by and

through Mr. Marsh, filed a motion to dismiss. At the outset of the hearing, Mr. Marsh orally amended that motion to state, as grounds therefor, that the operator of the Karen Mine had not been made a party to the proceeding. He explained in substance that he had mistakenly thought that K.O.K. was in some way related to Harlan. He said that he had only recently discovered that his true client, Harlan, was not related in any way to K.O.K. When queried by the Judge as to the identity of the person who had retained him, he replied that he had been employed by Mr. John Baugues,[1] the president of Harlan. The Judge apparently reserved his ruling (Tr. 20–22).

The hearing went forward with Mr. Marsh fully participating on behalf of Harlan. Toward the end of the hearing, counsel for MESA moved to amend to make Harlan a party to the proceeding, without specifying what was to be amended. The Judge also took this motion under advisement (Tr. 91).

Following the hearing, on April 5, 1974, Harlan renewed its motion to dismiss in its post hearing brief in support of its proposed findings and conclusions where once again counsel denied any knowledge of the existence of K.O.K.

Then, on August 15, 1974, MESA filed an extraordinary post-trial motion for production of documents in order to force Harlan to come forward with an alleged purchase contract between K.O.K. and Harlan covering the subject mine. As a showing of good cause under 43 CFR 4.583(a), MESA pointed out that the issue of operator identity was not raised until the day of the hearing.[2]

MESA appended to its motion to produce, as exhibits, copies of operator identity reports, allegedly concerning the Karen Mine, which were filed in the years 1971 through 1974 inclusive. 30 U.S.C. § 817 (1970), 30 CFR 82.1–82.20. The 1971 and 1972 reports name K.O.K. Coal Company as the operator and each is signed by Frank Qualls, Superintendent. The 1972 report which was filed on October 11, 1972, the month after the subject citations of violation were issued, recites that the identity number of the mine is 15–04033 and notes that John Baugues is the company president and James Hayhurst is the safety director. Some five months later, two new reports were filed. The first one, received March 16, 1973, is signed by John P. Baugues and recites in substance that Harlan No. 4 Coal Company is the operator of the Karen Mine which has the identity number 15–04033. Although there is a box on the form to indicate a "change notice," that box is blank. The second report was received on March 26, 1973, and it contains the same information as

[1] The reporter who typed the transcript misspelled Mr. Baugues' name as V-O-L-G-U-S. No formal objection or attempt to correct this and other aspects of the transcript has been made by Harlan.

[2] Under 43 CFR 4.583(a), discovery initiated 20 days after the initial pleading has been filed may take place with permission of the Judge upon a showing of good cause.

the March 16 report; it differs in that the signature belongs to James Hayhurst. Subsequent reports filed in October 1973, as well as January and May 1974, all name Harlan No. 4 Coal Company as the operator of the Karen Mine, and in each instance, John P. Baugues is identified as president and Frank Qualls as superintendent.

On August 28, 1974, the Judge issued an order requiring Harlan to support its motion to dismiss. The response was filed on September 5, 1974, and in it, Harlan denied purchasing the Karen Mine from K.O.K. and reiterated its denial of knowledge of the existence of any corporate entity named K.O.K. Coal Company. Furthermore, Harlan represented that, from the early 1960's until 1971, it had leased the subject mine, and that it had then purchased the mine from one William Conlet and/or others. Harlan specifically admits that it was the owner and operator of the Karen Mine during September 1972, when the subject citations were issued, and at all times thereafter.

By decision dated September 27, 1974, Judge Painter, *inter alia*, denied all pending motions and concluded that Harlan was the successor to K.O.K., and as such, was liable for the penalties assessed upon the subject notices of violation.

Harlan filed a notice of appeal on October 1, 1974, and timely briefs were filed by the Parties after having been granted extensions of time.

Issue on Appeal

Whether the Administrative Law Judge erred in denying a motion to dismiss on the ground of a failure to join and serve a necessary party.

Discussion

[1] Harlan contends that, as the operator of the Karen Mine, it cannot be assessed civil penalties for violations that occurred in such mine unless it was named in the subject notices and petition for assessment. Since, in point of fact, K.O.K. was the sole named respondent, Harlan argues that the Judge should have dismissed the proceeding. Furthermore, Harlan submits that the Judge erroneously found Harlan to be a successor to K.O.K. and urges that we set aside that finding and vacate the order of assessment based thereon.

First of all, we agree that the record provides no factual support for the Judge's theory of successor liability. There is no persuasive evidence to show that Harlan purchased the Karen Mine from K.O.K. as the Judge apparently surmised.

However, having concluded that the Judge erred in this respect, we are not driven to acceptance of Harlan's conclusion that a dismissal of the proceeding was the appropriate course of action. We reject that suggestion because the inferences to be drawn from the legal identity reports filed under section 107 of the Act support a finding that the cor-

porate entity, which has operated the subject mine at all pertinent times, has variously represented itself to be K.O.K. Coal Company and then Harlan No. 4 Coal Company. 30 U.S.C. § 817 (1970).

The principal reports are those that were filed on October 2, 1972, and March 16 and 26, 1973. In each instance, a member of management filed a report concerning one Karen Mine with the identity number 15–04033 and listed John P. Baugues as president. Although the two March reports represented a change from the October one in that Harlan is listed as the operator, there is no explanation for the discrepancy as is required, impliedly under section 107 of the Act and explicitly under 30 CFR 82.12–82.13. We also find significance in the fact that the personnel listed on the October 2, 1972 report appear as well on the March 26 report, and, with respect to Frank Qualls in particular, on the 1974 reports. Based on the contents of these reports and counsel's insistence that Harlan was the true operator at all pertinent times, we find that the corporate entity involved in the case at hand, through its agents acting apparently within the scope of their duties, represented itself to the Secretary to be K.O.K. Coal Company, and later, Harlan No. 4 Coal Company. In our opinion, the inspector who issued the subject notices and MESA had every reason to rely on these reports showing K.O.K. to be the operator of the subject mine.

Counsel's disclaimer of any knowledge of K.O.K. on behalf of his client simply does not ring true. While it is within the realm of possibility that he personally may have had no such knowledge, the same cannot be said with regard to Harlan itself. It is responsible for and must be deemed to have constructive knowledge of the acts of its subordinates performed within the apparent scope of their agency, that is, the filing of required identity reports with the Secretary.

Moreover, we think that counsel's rebuttal to the legal identity reports underscores the weakness of his position. He objected on grounds of incompetence and irrelevance.[3] He neither claimed that these reports were fraudulent, nor offered others in their place, nor sought to deal directly with obvious questions they raise. The objections submitted were patently frivolous, particularly in light of the fact that counsel sought and achieved admission into the record of the March 16, 1973 report as Operator Exhibit No. 1. Indeed, in light of the whole record, it seems to us that counsel for Harlan should have investigated and come forward with some explanation of these reports since the information was in the possession of his client's employees, and his failure to do so, suggests that he may have deliberately set out to confuse the issues

[3] He also objected on the ground that these reports were not offered at the hearing. These exhibits are official documents of the Department and the respondent-appellant operator has had several opportunities to submit rebuttal. 5 U.S.C. § 556(d) (1970). *Glendenning v. Ribicoff*, 213 F. Supp. 301 (D. Mo. 1962). Finding these exhibits relevant, we are taking official notice of them. 43 CFR 4.24(b).

and confound the Administrative Law Judge.

In any event, it is clear to us that the respondent in fact, however it chose to style itself, was properly served with all relevant papers and defended this proceeding from the very beginning. We find that K.O.K. Coal Company and Harlan No. 4 Coal Company, insofar as this case is concerned, are one and the same, and we conclude that Harlan is liable for the penalties assessed. Accordingly, we are modifying the decision below by setting aside inconsistent findings and conclusions of successor liability, and affirming the Judge's denial of Harlan's motion to dismiss for the reasons stated above.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS AFFIRMED AS MODIFIED by the foregoing opinion.

IT IS FURTHER ORDERED that Harlan No. 4 Coal Company SHALL PAY the penalties assessed in the amount of $1,150 on or before thirty days from the date of this decision.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

BILLY F. HATFIELD, ET AL.
v.
SOUTHERN OHIO COAL COMPANY

4 IBMA 259

Decided *June 25, 1975*

Appeal by Billy F. Hatfield, et al., from a decision and order of Administrative Law Judge Edmund M. Sweeney in Docket No. VINC 75-248 dismissing their application for compensation under section 110(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed in part, reversed in part, and remanded.

1. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation: Generally

A claim for compensation under sec. 110(a) at the rate allowable for withdrawal orders issued for an unwarrantable failure to comply with a mandatory standard is not sustainable where such claim is predicated upon an imminent danger withdrawal order issued under section 104(a) of the Act.

2. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation: Dismissal

An application for compensation filed under sec. 110(a) of the Act may not be dismissed pursuant to motion in the prehearing stage if it states any claim upon which relief may be granted.

APPEARANCES: John W. Cooper, Esq., for appellants, Billy Hatfield, et al., members of United Mine Workers of America, District 6; William A. Gershuny, Esq., for appellee, Southern Ohio Coal Company.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This case comes to the Board as an appeal from a prehearing dismissal of an application for compensation filed on behalf of Billy F. Hatfield, *et al.* (claimants),[1] by their authorized representative, the United Mine Workers of America, District 6, under section 110(a) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 820 (a) (1970).[2] Pursuant to motion by Southern Ohio Coal Company (respondent), the Administrative Law Judge dismissed the subject application,[3] holding in substance that the claimants had failed to state a legally sufficient claim for the relief sought, namely, compensation at the rate allowable for a section 104 order issued for an unwarrantable failure to comply with a mandatory standard.[4] The claimants contend that the Judge was in error in ruling as he did, and further, that if their claim is not held by the Board to be legally sufficient in all respects, it will thereby render section 110(a) unconstitutional under a line of equal protection cases interpreting the Due Process Clause of the Fifth Amendment to the Constitution.

In light of the procedural posture of this appeal, we assume the truth of the allegations in the claimants' application insofar as they represent statements of fact. Given such assumption, we nevertheless conclude that the Judge correctly held that the application does not state a

[1] This appeal was originally styled *United Mine Workers of America, District 6 (UMWA, Dist. 6)* v. *Southern Ohio Coal Company.* Upon examination of the record, it became clear that individual members of UMWA, Dist. 6, are the real parties in interest rather than the Union. Accordingly, we have restyled the case, using the caption which appears above.

[2] Section 110(a) provides as follows:

"If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. If a coal mine or area of a coal mine is closed by an order issued under section 104 of this title for an unwarrantable failure of the operator to comply with any health or safety standard, all miners who are idled due to such order shall be fully compensated, after all interested parties are given an opportunity for a public hearing on such compensation and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. Whenever an operator violates or fails or refuses to comply with any order issued under section 104 of this Act, all miners employed at the affected mine who would be withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated."

[3] We interpret the dismissal to be with prejudice since the Judge did not indicate otherwise.

[4] Judge Sweeney concluded that he had no "jurisdiction" to grant such relief. However, the question before him and now before the Board is not jurisdictional in nature. A Judge has subject matter jurisdiction over compensation cases and the real question was and is whether claimants have stated legally sufficient claims.

legally sufficient claim for compensation at the rate allowable under section 110(a) in instances where "* * * a coal mine or an area of a coal mine is closed by an order issued under section 104 * * * for an unwarrantable failure of the operator to comply with any health or safety standard, * * *." However, we hold that the Judge erred in granting the motion to dismiss because the subject application does state legally sufficient claims for compensation at the rate due for idlement caused by an imminent danger withdrawal order. Accordingly, we are reversing his decision in part and remanding the case for further proceedings not inconsistent with this opinion. We intimate no views on the constitutional question posed by claimants because the resolution of such questions is beyond our authority.[5]

Procedural and Factual Background

On July 19, 1974, a federal coal mine inspector issued an imminent danger withdrawal order pursuant to subsection (a) of section 104 of the Act at Respondent's No. 2 Mine. 30 U.S.C. § 814(a) (1970). Subsequently, modified withdrawal orders were issued pursuant to subsections (a) and (g) of section 104 covering the period from July 20 through July 27, 1974 inclusive. 30 U.S.C. § 814(a) (g) (1970). None of these orders was ever challenged by application for review.

On September 3, 1974, the claimants filed their application for compensation pursuant to 43 CFR 4.560–4.562. The issues were joined on September 10, 1974, when respondent timely filed an answer containing various admissions, averments, and denials. 43 CFR 4.563. At the same time, respondent moved for dismissal, contending in substance that claimants failed to state a claim upon which relief can be granted.

Claimants initiated discovery on September 23, 1974, by serving on respondent a request for admissions and filing a copy thereof with the Hearings Division. 43 CFR 4.585. Respondent refused to accede to this request and filed a statement of objections.[6] It also sought postponement of discovery pending disposition of its motion to dismiss.

On October 3, 1974, the Mining Enforcement and Safety Administration (MESA) sought leave to participate as an *amicus curiae*. That motion was granted by order

[5] *See United States* v. *Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 3106 (1974); *Public Utilities Comm'n. of California* v. *United States*, 355 U.S. 534, 539–40 (1958); *Panitz* v. *District of Columbia*, 112 F.2d 39 (D.C. Cir. 1940); *Buffalo Mining Co.*, 2 IBMA 226, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973); *Zeigler Coal Co.*, 4 IBMA 139, 82 I.D. 221, 1974–1975 OSHD par. 19,638 (1975).

[6] A party which receives a request for admissions need not file a statement of objections to justify a refusal to admit, as is required in the case of a refusal to answer interrogatories, and an Administrative Law Judge may not force such party to make an admission if it wishes to litigate an issue of fact. 43 CFR 4.585.

of the Judge dated October 16, 1974.[7]

Thereafter, pursuant to orders of the Judge, briefs were filed with respect to respondent's pending motion and oral argument was held on November 6, 1974. The dismissal and the opinion in support thereof were handed down on December 11, 1974.

Claimants filed a timely notice of appeal with the Board on December 30, 1974. Timely briefs by all participants have since been received.

Issues on Appeal

A. Whether claimants' application for compensation stated legally sufficient claims under section 110 (a) for compensation allowable for an order issued under section 104 for an unwarrantable failure to comply with any mandatory standard.

B. Whether claimants' application for compensation should be dismissed for failure to state any claim upon which relief can be granted.

Discussion

A.

[1] The subject application for compensation alleges, *inter alia*, idlement due to an order of withdrawal and subsequent modifications thereof which were issued for an imminent danger resulting from an unwarrantable failure to comply with a mandatory standard. Claimants argue that these allegations constitute a legally sufficient claim for compensation at the rate allowable for "* * * an order issued under section 104 * * * for an unwarrantable failure of the operator to comply with any health or safety standard, * * *." The Judge rejected that contention, relying upon the Board's decision in *United Mine Workers of America, District 31 (UMWA, Dist. 31)* v. *Clinchfield Coal Co.*, 1 IBMA 31, 78 I.D. 153, 1971–1973 OSHD par. 15,367a (1971).

In *UMWA, Dist. 31* v. *Clinchfield Coal Co.*, *supra*, the Board concluded that the rate of compensation under section 110(a) of the Act is governed by the order as issued. 1 IBMA at 45. There, the Board dealt with an application predicated upon a section 104(a) imminent danger withdrawal order and ruled in substance that an allegation of unwarrantable failure was irrelevant as a matter of law because proof of such failure could not in any way alter the nature of the withdrawal order which governs the compensatory rate.

On appeal, claimants acknowledge the applicability of the *Clinchfield* decision, but argue nevertheless that that case was wrongly decided in pertinent part and should be overruled. They contend in substance that if it can be proved that a section 104(a) imminent danger withdrawal order cites a condition or practice constituting a violation

[7] MESA took the position that the application for compensation should be dismissed for failure to state a legally sufficient claim for relief that can be granted.

of any mandatory standard which is the result of an unwarrantable failure to comply, then such order is, in the words of section 110(a), "* * * an order issued under section 104 * * * *for* an unwarrantable failure of the operator to comply with any health or safety standard, * * *." [Italics added.] As such, the applicable rate of compensation would be the more generous of the two alternatives set forth in section 110(a). Claimants insist that the reasoning just outlined is more in accord with the intent of the Congress than that of the Board in *Clinchfield*.

The argument of the claimants stands or falls on the meaning of the ambiguous preposition, "for," *italicized* in the above-quoted portion of section 110(a). Fortunately, the legislative history is unusually illuminating with respect to this section of the Act and we need not speculate as to the meaning of that word or the true intent of the Congress.

The pertinent piece of the legislative history is the portion of the Conference Committee report devoted to explaining the ultimate compromise of the differing compensation provisions in the two bills which emerged from the House and Senate, respectively. At page 1035 of *House Comm. on Ed. and Labor, Legislative History, Federal Coal Mine Health and Safety Act*, Comm. Print, 91st Congress, 2d Session, the conferees' report reads as follows:

Section 110

The Senate bill provided that where a withdrawal order is issued for repeated failures to comply with a health or safety standard, the Secretary, after giving an opportunity for a hearing to interested persons, shall order all miners who are idled due to the order to be fully compensated by the operator at their regular rates of pay for the time they were idled, or for 1 week, whichever is the lesser. These orders would be subject to judicial review. The corresponding provision of the House amendment provided that where a withdrawal order has been issued all miners working during the shift when the order was issued who are idled by the order will be entitled to full compensation at their regular rates of pay for the period they are idled, but not for more than the balance of the shift. If the order is not terminated prior to the next working shift, all miners on that shift who are idled will be entitled to full compensation for the period they are idled, but for not more than 4 hours of the shift. The substitute agreed upon in conference adopts the provisions of the House amendment, except that where the mine is closed by an order issued on account of an unwarrantable failure of the operator to comply with a health or safety standard, the miners who are idled will obtain the benefits described in the Senate bill.

This section of the House amendment also contained a provision, which is retained in the conference substitute, under which an operator who violates or fails or refuses to comply with a section 104 order must pay full compensation at regular rates of pay to miners who should have been withdrawn or prevented from entering the mine or portion thereof as the result of that order, in addition to pay received for work performed after such order is issued.

Nothing in this section is intended to interfere with or preempt any collective bargaining agreement.

By adopting the more restrictive provision of the House bill as the general rule, the conferees and later the majority of the Congress opted for a narrowly defined benefit and rejected a broader standard. The last sentence of the above-quoted portion of the conference report suggests that the legislators chose to leave the issue of more generous benefits in most instances of idlement due to health and safety problems to the collective bargaining process. In any event, the above-quoted passage makes clear that the statutory right to a more liberal benefit is carefully limited to those situations " * * * when the mine is closed by an order issued *on account of* an unwarrantable failure of the operator to comply * * *." [Italics added.] The phrase "on account of" is synonomous with the statutory word "for" and indicates that that word means—motivated by. It therefore follows that the more generous compensatory rate is applicable as a matter of right only in those instances where the motivating cause for the withdrawal order, upon which the claim is predicated, is a finding of unwarrantable failure by the inspector, or in other words, the order must be a section 104(c) unwarrantable failure withdrawal order as such. Whether an inspector could have found an unwarrantable failure or whether the condition actually was the product of such failure is accordingly irrelevant as a matter of law.

Inasmuch as the motivating cause for the issuance of the subject withdrawal order was not alleged to be a finding of an unwarrantable failure to comply, that is to say, appellants' application contains no allegation of a section 104(c) withdrawal order, the Judge correctly concluded in substance that the application for compensation failed to state a legally sufficient claim for relief at the rate prescribed in section 110(a) for " * * * an order issued under section 104 * * * for an unwarrantable failure * * * to comply with any health or safety standard, * * *."

B.

[2] We come then to the remaining question for decision, namely, whether dismissal was appropriate in the circumstances. We hold that it was not.

In the prehearing stage of a proceeding, a motion to dismiss for failure to state a claim may be granted where no grounds have been stated or facts alleged, that, if proved, would entitle a party to any relief that can be granted. *See A.K.P. Coal Co.*, 3 IBMA 136, 81 I.D. 226, 1973–1974 OSHD par. 18,478 (1974), *aff'd, sub nom. A.K.P. Coal Co.* v. *Morton*, 501 F.2d 1363 (6th Cir. 1974). Although the dimensions of the claims for compensation here are not entirely clear, we nevertheless can discern claims upon which relief may be granted.

As noted earlier, claimants have alleged in substance idlement due to an imminent danger withdrawal order, and subsequent modifications thereof, resulting from an unwar-

rantable failure to comply with a mandatory standard. They have also alleged a demand for compensation which was denied.

Accepting these allegations as true because this appeal arises out of a prehearing motion to dismiss, we note first that the allegation of unwarrantable failure is, for the reasons stated earlier, irrelevant, and therefore subject to a motion to strike. But, apart from that allegation, claimants' application, as it stands now, appears to state legally sufficient claims for compensation at the rate allowable under section 110(a) for an imminent danger withdrawal order. *See UMWA, Dist. 31* v. *Clinchfield Coal Co., supra.*[3] Consequently, the Judge should either have denied respondent's motion to dismiss or granted it without prejudice to a motion by claimants for leave to amend. In any event, he erred in granting outright dismissal.

What is unclear now, among several things, is whether claimants are alleging idlement separately traceable to each of the modification orders, as well as the initial order, for which compensation is supposedly due. Moreover, although respondent in its answer has admitted some liability and claims to have paid such compensation as was due, we are uncertain as to whether such admission extends to the modification orders and as to whether the amounts of compensation, if any, have been paid. In any event, there are litigable and legally sufficient claims in this proceeding, and the Judge and the parties can deal with the outstanding issues upon remand.

[3] The *Clinchfield* case was an interlocutory appeal and, having decided that claimants' request for the more liberal rate of compensation had to be denied, we remanded the case for further proceedings.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the decision appealed from IS AFFIRMED IN PART, IS REVERSED IN PART, and the case IS REMANDED for further proceedings not inconsistent with this opinion.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

EASTERN ASSOCIATED COAL CORPORATION

4 IBMA 273

Decided *June 26, 1975*

The above-referenced appeals by Eastern Associated Coal Corporation (Eastern) arise under sections 105 and 301 (c) of the Federal Coal Mine Health and Safety Act of 1969[1] hereinafter "the Act." The Board has consolidated these three appeals for its consideration and decision at the request of the parties hereto.

[1] 30 U.S.C. §§ 801–960 (1970).

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Generally

An operator's Petition for Modification of the application of a mandatory safety standard will be denied where it fails to establish that the proposed alternative method will at all times guarantee no less than the same measure of safety protection to the miners as the mandatory standard.

APPEARANCES: Daniel M. Darragh, Esq., for appellant, Eastern Associated Coal Corp.; Richard V. Backley, Esq., Assistant Solicitor and John D. Austin, Jr., Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

The initial appeal, 4 IBMA 273 (IBMA 75-15), is from a decision by Administrative Law Judge William Fauver (Judge), dated November 1, 1974, in Docket Nos. HOPE 73-448 and M 73-23, in which the Judge denied an Application for Review of an Order of Withdrawal issued under section 104(a) of the Act, and denied a Petition for Modification of the application of the mandatory safety standard set forth in 30 CFR 75.802. Eastern's appeal from this decision is limited to the denial by the Judge of the Petition for Modification involving high-voltage equipment at its Keystone No. 4 Mine in Stotesbury, Raleigh County, West Virginia.

The remaining two appeals, IBMA 75-34 and IBMA 75-35, are from the same Judge's decisions, dated February 27, 1975, in Docket Nos. HOPE 73-500 and M 73-27. In Appeal No. IBMA 75-34, the Judge denied an Application for Review of a Notice of Violation issued under section 104(b) of the Act, charging a violation of 30 CFR 75.803 and in Appeal No. IBMA 75-35 denied a Petition for Modification of the application of the mandatory safety standard set forth in 30 CFR 75.803, requiring fail safe ground check circuits on high-voltage resistance grounded systems at Eastern's Kopperston No. 1 Mine in Kopperston, Wyoming County, West Virginia.

Eastern and the Mining Enforcement and Safety Administration (MESA) stipulated before the Judge that they would be governed in the latter two cases by his decision in Docket Nos. HOPE 73-448 and M 73-23. They filed an identical stipulation before the Board which appears as follows:

STIPULATION

AND NOW come the parties Appellant, Eastern Associated Coal Corp., and Appellee, Mining Enforcement and Safety Administration, and file the within stipulation in the above captioned matters for the following reasons:

1. The parties had filed a stipulation in Docket Nos. M 73-27 and HOPE 73-500

agreeing that the result in said cases should be governed by the result in Docket No. M 73–23.

2. An initial decision was issued in Docket No. M 73–23 denying Eastern's petition and Eastern has appealed at IBMA 75–15.

3. Subsequently, the Administrative Law Judge issued initial decisions in M 73–27 and HOPE 73–500 in accord with the parties' stipulation.

4. For the aforesaid reasons, the parties agree to continue the stipulation filed initially which provides to wit:

(a) if Appellant's petition in IBMA 75–15 is denied, a surface ground wire system will be required for stationary surface electrical equipment and Appellant will comply with 30 C.F.R. § 75.803 and install an appropriate ground check circuit with the ground wire system; and

(b) if Appellant's petition in IBMA 75–15 is granted, a surface ground wire system for stationary electrical equipment will not be required, and a ground check circuit as required by 30 C.F.R. § 75.803 would be ineffective in monitoring the grounding circuit, rather Appellant will check the resistance of the earth grounding field at regular intervals.

5. This stipulation will dispose of all issues raised in IBMA Nos. 75–34 and 75–35, and, therefore, the parties request that this stipulation be accepted in lieu of any briefs in the above captioned matters.

Date: *March 13, 1975.*

(s) Daniel M. Darragh
DANIEL M. DARRAGH
Legal Assistant
EASTERN ASSOCIATED
COAL CORP.
1728 Koppers Building
Pittsburgh, Pennsylvania 15219

Date: *March 18, 1975.*

(s) Joseph M. Walsh
JOSEPH M. WALSH
Trial Attorney
UNITED STATES DEPARTMENT OF
THE INTERIOR
Office of the Solicitor
Division of Mine Health &
Safety
800 North Quincy Street
Arlington, Virginia 22203

The factual and procedural background of these cases and the reasons underlying the Judge's decision are adequately set forth in his decision in Docket No. M 73–23 (IBMA 75–15) which is appended and paginated hereinafter. There is presently a stay of enforcement in effect preventing MESA from enforcing either the Order of Withdrawal or Notice of Violation. This stay was ordered by the Judge at the commencement of the proceeding below and terminated in his decision in Docket No. HOPE 73–448 and M 73–23. By order dated January 10, 1975, the Board denied a motion in opposition to continuation of the stay of enforcement filed by MESA on the grounds that under 43 CFR 4.574 the Judge's termination of the stay was stayed by the timely filing of a Notice of Appeal and that MESA had not put forward any arguments which would warrant lifting the stay.

Issues Presented

A. Whether the Judge erred in concluding that the standard set out at 30 CFR 75.801 does not establish the standard of safety required by 30 CFR 75.802.

B. Whether the Judge erred in concluding that appellant's proposed alternative system did not provide the same measure of protection to miners as would be pro-

vided by full compliance with the standard set out at 30 CFR 75.802.

Discussion

A.

We concur in the statement made by Eastern in its brief that, "the ultimate question is whether MESA is correct in asserting that section 75.801 does not establish the objective level of safety required by section 75.802." On this question Eastern takes the position that the level of safety required by 30 CFR 75.802 is a limitation of fault voltage to no more than the 100 volts as required by 30 CFR 75.801. Eastern argues that 30 CFR 75.802 does *not* establish "* * * a quantitative standard of safety which must be at least equalled by an alternate system in order to obtain a modification * * *" and from this concludes that the 100-volt "fault voltage limitation" standard of 30 CFR 75.801 must be applied in determining whether to authorize the modification it seeks. MESA takes the opposite view, and has consistently opposed the granting of Eastern's Petition.

We find Eastern's argument to be unpersuasive. As we understand it, the only provision of 30 CFR 75.801 [2] relevant to Eastern's Petition is the standard by which the "suitable resistor" referred to in 30 CFR 75.802(a) is to be judged. A "suitable resistor" is but one of several requirements of 30 CFR 75.802 which must be met in determining the total effect of Eastern's proposal. As to this issue, we affirm the Judge that the standard set out at 30 CFR 75.801 does not establish the standard of safety required by 30 CFR 75.802.

B.

[1] With respect to the second and main issue here on appeal, we believe it is basic to an understanding of any Petition for Modification that the standard against which the proposed alternative will be measured is that degree of safety or protection which full compliance with the standard sought to be modified provides. In the instant case, Eastern seeks to modify 30 CFR 75.802. Eastern's proposed modification of its application must therefore be considered in light of the facts adduced at the hearing and weighed against complete compliance with all of the requirements of that standard in order to determine whether the alternative proposed will at all times guarantee no less than the same measure of protection afforded the miners by adherence to the standard. If it complied fully with this standard there is ample evidence of record to indicate that the resulting fault voltage would range to a maximum of 70 volts; whereas Eastern's alternative plan would result in fault voltage which would range to a maximum of 90

[2] The pertinent part of 75.801 reads as follows:

"The grounding resistor, where required, shall be of the proper ohmic value to limit the voltage drop in the grounding circuit external to the resistor *to not more than 100 volts under fault conditions.*" (Italics added.)

volts (Tr. 202–203). Accordingly, we believe, as did the Judge, that Eastern's Petition for Modification would not guarantee no less than the same measure of protection to the miners as that provided by strict and full compliance with 30 CFR 75.802. Accordingly, this Petition must be denied.

In accordance with the stipulation cited above, and our affirmance of the Judge's denial of Eastern's Application for Review and Petition for Modification contained in IBMA 75–15, the Judge's decision in both IBMA 75–34 and IBMA 75–35, denying an Application for Review and Petition for Modification respectively, must be affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decisions in the above-captioned cases ARE AFFIRMED. IT IS FURTHER ORDERED that the stay of enforcement IS TERMINATED.

C. E. Rogers, Jr.,
Chief Administrative Judge.

We concur:

David Doane,
Administrative Judge.

Howard J. Schellenberg, Jr.,
Alternate Administrative Judge.

DECISION

November 1, 1974

IN THE MATTER OF EASTERN ASSOCIATED COAL CORP.

Applicant/Petitioner.

Application for Review Docket No. HOPE 73–448.

Petition for Modification, Docket No. M 73–23 (Keystone No. 4 Mine, *et al.*).

These proceedings were brought by Applicant/Petitioner (Eastern) pursuant to the provisions of section 105(a)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, *et seq.* (1970), for review of Notice of Violation No. 1 BEM, issued December 11, 1972, at Eastern's Keystone No. 4 Mine, charging a violation of section 75.802, Part 75 of Title 30, Code of Federal Regulations, and pursuant to the provisions of section 301(c) of the Act, for modification of the application of said Regulation to six designated coal mines.[1]

The key legal issue herein is the meaning and application of the mandatory electrical safety standard cited in the Notice of Violation, *i.e.*, 30 CFR 75.802.

Section 75.802 is a verbatim restatement of section 308(b) of the Federal Coal Mine Health and

[1] A seventh mine, the Delmont Mine, was originally included in the Petition for Modification, and later stricken upon motion of Eastern.

Safety Act, 30 U.S.C. § 868(b) (1970), which provides in pertinent part:

> High-voltage circuits extending underground and supplying portable, mobile, or stationary high-voltage equipment shall contain either a direct or derived neutral which shall be grounded through a suitable resistor at the source transformers, and a grounding circuit, originating at the grounded side of the grounding resistor, shall extend along with the power conductors and serve as a grounding conductor for the frames of all high-voltage equipment supplied power from that circuit * * *.

The Notice of Violation charges a violation of the above standard as follows:

> The 4160 volt circuit that originated at the Tams substation and extends underground through Lester Air Shaft and Scab Fork Road bore hole did not contain a proper resistance grounded neutral located at the source transformer and a grounding circuit originating at the grounded side of the resistor and which extended along with the power conductors to serve as a grounding circuit for the frames of all equipment receiving power from that circuit was not provided.

The two basic elements of this notice may be summarized as follows:

1. There is no resistance-grounded neutral at the source transformer.

2. There is no grounding circuit from the grounded side of the resistor extending along with the power conductors to serve as a grounding circuit for the frames of all equipment on the circuit.

Contending that the mine was not in violation of section 75.802, Eastern filed Application for Review HOPE 73–488.

Inasmuch as five other mines owned by Eastern have electrical systems which are substantially the same as that of Keystone No. 4, Eastern chose to follow an additional, alternative avenue of approach and filed Petition for Modification M–73–23.

The Mining Enforcement and Safety Administration (MESA)[2] contends that the term "source transformer" as used in section 75.802 means the power transformer which is the source of the current entering the circuit. Eastern contends that the term "source transformer" should be interpreted to mean the source of the neutral.

MESA takes the position that all equipment, including surface equipment, which is served by a high-voltage circuit which at some point extends underground must be connected by a grounding circuit to the resistance ground at the source transformer. Eastern asserts that "the grounding circuit required by section 75.802 applies only to underground equipment and has no relevance whatsoever to surface equipment."

Eastern argues, alternatively, that if there is a violation of section 75.802, its existing electrical systems provide adequate safety protection to warrant a modification of the application of the standard to the mines involved herein.

The International Union, United Mine Workers of America, which is the authorized representative of the

[2] Previously Bureau of Mines. See 38 FR 18695 (July 13, 1973), for transfer of functions effective July 16, 1973.

miners employed at the six mines involved, intervened on the side of MESA in opposing the Application for Review and the Petition for Modification.

The cases were consolidated for decision and hearing and were heard on March 7 and 8, 1973, at Arlington, Virginia. Eastern's proposed findings and conclusions and brief were filed on May 14, 1973; the Union's counter-proposed findings and conclusions and brief were filed on June 13, 1973; and MESA's counter-proposed findings and conclusions and brief were not filed until July 15, 1974.

The hearing record includes extensive testimony from expert witnesses and detailed documentary evidence concerning the electrical distribution systems and proposed modifications at issue.

DISCUSSION

I. *The Application for Review*

The issue in the Application for Review proceedings is a matter of construction and interpretation of section 75.802.

MESA and the Union interpret the term "source transformer" [3] in section 75.802 to mean a transformer which receives electricity and "transforms" it by stepping down or raising the voltage for transmission to the equipment served by the circuit. If this interpretation is correct Eastern is in violation of section 75.802 because the transformer (in each of the six mines) which receives the high-voltage and "transforms" it (steps down the voltage) is earth-grounded (not wire-grounded) and the electrical system does not have a ground wire circuit extending from a ground resistor at the source transformer to the frames of the equipment using the circuit.

Eastern contends that a "source transformer" as used in section 75.802 means the "source" of the neutral, not the power source. By this, Eastern means that its zigzag transformer, described below, is a "source transformer" within the meaning of the Regulation.

A. *The Zigzag Transformer*

Exhibit A is a simplified one line schematic generally depicting the three-phase high-voltage distribution system used at the six mines. The overhead transmission line enters the main substation transformer (which MESA contends is the "source transformer") where the voltage is stepped down from 13,200 volts to 4,160 volts.

After leaving the secondary side of the main substation transformer, the 4,160 volt overhead transmission line serves two separate surface facilities, *i.e.*, the mine substation and a tap line to the ventilation fans. The ground conductor for all stationary surface equipment is the earth. The metallic frames of the

[3] Although the standard (30 CFR § 75.802 and section 308(b) of the Act) uses the plural "source transformers," the term is discussed herein in the singular since the standard can logically apply to only one "source transformer" at each circuit at issue here.

surface fans are earth grounded. There is no ground wire connecting the stationary surface fans or the mine substation with the main substation transformer.

The mine substation contains the zigzag transformer, which derives the neutral, an OCB (oil circuit breaker) type 2, a lightning arrestor, and a manual disconnect switch. The zigzag transformer's derived neutral is resistance grounded at the mine substation, which is located at the mine portal. The high-voltage cable extending underground from the mine substation contains the three-phase power conductor and a wire grounding circuit, which is connected to the metal frames of all equipment underground using power from the cable.

The clear preponderance of the expert testimony establishes that the zigzag transformer is not a power transformer as used at Eastern's mines, but is used simply to derive a neutral for the circuit entering underground.

The testimony of Dr. E. K. Stanek, one of Eastern's witnesses, was as follows:

JUDGE FAUVER: What is it ordinarily used for and particularly in this case what is it used for?

THE WITNESS: For this case, it's used for the purpose of deriving a neutral and therefore the conductors in the windings are made small intentionally, because there is not going to be a lot of current flowing through.

JUDGE FAUVER: Is it used to transform voltage?

THE WITNESS: In this application it's not.

JUDGE FAUVER: It is not. In the jargon of your profession would you describe this as a transformer in its use here?

THE WITNESS: In the sense that it has windings and core, I think I would still call it a transformer.

JUDGE FAUVER: In its functional use, would you say that it was functionally used as a transformer in this case?

THE WITNESS: In its functional use, it's being used to produce a neutral.

JUDGE FAUVER: Which would or would not be a transformer in your own jargon?

THE WITNESS: In my own jargon, it's not being used as a transformer. (Tr. 209, 210.)

Another expert witness for Eastern, Mr. Donald F. Criste, its Chief Engineer, described the zigzag transformer as follows:

Q. (By Mr. Boettger, Counsel for Eastern): This is meant to represent a transformer? [Reference made to a symbol on Respondent's Exhibit A designating a main transformer].

MR. CRISTE: This is meant to represent a transformer. A transformer in this case, and normally as we consider a transformer's function is to step down the voltage from one transmission voltage to some lower utilization voltage. (Tr. 22.)

* * * * *

Q. Is this [the substation which contains the zigzag transformer] located on the surface or underground?

MR. CRISTE: It is on the surface. This is on the surface at the mine portal. It has similar electrical protection, such as lightning arresters, disconnect switch, OCB type 2—again an oil circuit breaker to disconnect the power under various conditions being necessary or desirable, naturally under unwanted conditions of faults, other circuits, the like—beyond the circuit breaker then is connected to a, what we would call a zigzag trans-

former, it's a neutral deriving transformer and it's shown depicted somewhat in the configuration it gave its name. Its windings are connected in a zigzag fashion and it has established a neutral point, in other words, you have to show three legs of this transformer, where other transformers we have didn't. But in order to depict the zigzag effect of the name, it shows three legs so that each leg is connected to one phase of the power system. That establishes a neutral point on that power system. A neutral point, which as the name indicates, it's a center point, a neutral. There's no current flow out of it, unless required. (Tr. 26.)

Another expert witness, Mr. John W. Ely, Eastern's Electrical Engineer, testified as follows:

A transformer usually has two windings and it's used either to step up or step down the voltage level. Now the zigzag transformer doesn't do this. The zigzag transformer has a single winding. It's used for a specific purpose of deriving a neutral or a neutral point in the system. (Tr. 97.)

Relying upon similar reasoning, the expert witness for MESA, Mr. Ralph Rinehart, testified that the zigzag transformer is not a source transformer within the meaning of section 75.802:

JUDGE FAUVER: Now, we've asked everybody else in this case except you, I believe, do you have an opinion whether the zigzag transformer is the source transformer within the meaning of 75.-802. As an electrical engineer, do you have an opinion?

THE WITNESS: I feel that the source transformer is the source of power.

JUDGE FAUVER: Which means what?

THE WITNESS: The main transformers. (Tr. 318.)

The preponderance of the expert testimony shows that the zigzag transformer used by Eastern is not a true power, or source, transformer within the principles of the electrical engineering profession. As recognized by Dr. Stanek, Eastern's witness, the word "source" means the source of energy:

JUDGE FAUVER: There was a reference also yesterday to the meaning of the word "source"—if it has any particular meaning in the electrical engineering profession. Of course, a layman would think of the word source as a spring, a fountainhead, an origin, the beginning of something. Does it have a different or particular meaning in the electrical engineering profession?

THE WITNESS: A source in the electrical engineering profession means a source of energy in the context that I usually use it. So, it could be a generator, for instance, or a source of power.

JUDGE FAUVER: Is the zigzag transformer as used in this case, in your opinion, a source of energy? What is the source of energy that the underground equipment is supplied with?

THE WITNESS: In the most basic sense the source of energy is the generator back at the power plant.

JUDGE FAUVER: And when source is used as an adjective to describe source transformer, where would that source be in this case, in your opinion?

THE WITNESS: At the switch yard above here. This transformer here, Sir.

JUDGE FAUVER: That is the first transformer that receives power from the power line, is that right?

THE WITNESS: Yes. In a sense, if you consider one of the functions of the transformer is to provide a neutral path I guess you could consider this whole area to be a part of the source transformer. (Tr. 210, 211.)

It is significant to note that Dr. Stanek recognized that the power transformer is the source trans-

former and indicated that there is even some doubt that providing a neutral is one of the functions of a transformer.

MESA argues that there is no ambiguity in the use of the term "source transformer" and that the statute speaks clearly on the issue. A "source" means an origin, a starting place, and in electrical engineering a source of energy. A transformer changes voltage. Eastern's zigzag transformer neither supplies energy to a high-voltage circuit nor transforms voltage. MESA contends, therefore, that the zigzag transformer cannot be a "source transformer" within the meaning of 30 CFR 75.802 and section 308(b) of the Act.

The obvious intent of section 308 (b) is to control and prevent shock and electrocution hazards in high-voltage circuits. When "source transformer" is interpreted to mean the source of power, *i.e.*, the power transformer, the goal of protection from shock and electrocution hazards is best served, since that interpretation would require the protection where the operator first has control over the electrical circuit. As implicitly recognized in the expert testimony in this case, it would not be reasonable to consider the power company's generating plant as the source transformer. It would be equally unreasonable—keeping in mind the intent of the law to require the operator to minimize shock hazards—to consider some point well past the operator's power transformer as the place to apply the electrical safety standard. The operator has no control over the generating plant, but the transformer that first receives electricity from the generating plant is fully controlled by the operator and is the logical point at which to begin providing protection. Furthermore, no characteristic of the zigzag transformer has been shown that would render anything but arbitrary its being viewed as a "source transformer" within the meaning of the pertinent regulation and statutory language. It is therefore held that the main substation transformer, and not the zigzag transformer, at Eastern's mines is the "source transformer" within the meaning of 30 CFR 75.802.

B. *Stationary Surface Facilities*

Section 75.802, upon which Notice of Violation No. 1 BEM (12/11/72) was based, states in part:

> **High-voltage circuits extending underground and supplying portable, mobile, or stationary high-voltage equipment shall be grounded * * ***

Further on the section reads:

> *** * * for the frames of all high-voltage equipment supplied power from that circuit.**

Eastern contends that this language should be construed to apply only to equipment underground, because the title given section 75.802 and section 308(b) of the Act is "Underground High-Voltage Distribution." Citing 1 Am. Jur. 2d, Administrative Law § 40, Eastern notes:

A construction which will render any part of a statute inoperative, superfluous, or meaningless is to be avoided.

MESA contends that a construction of the statute to exclude stationary surface facilities from its scope would render much of the section inoperative, superfluous and meaningless.

At each of Eastern's mines in question, a fault on the surface facilities may result in an "elevation" or increase in voltage on the frames of underground equipment. The testimony of Dr. Stanek, Eastern's witness, substantiates this:

Q. (Mr. Backley): Doctor, if you did have a fault in the surface portion of this electrical system as it is now, what effect, if any, would it have on the underground portion?

A. A line to ground fault would cause a voltage to appear on the frames of machines that would not be in excess of 100 volts assuming the two ohm ground is achieved. (Tr. 167.)

The evidence shows that, at each of the six mines, the surface high-voltage equipment is interconnected with the underground high-voltage equipment by the same power supply. In essence the circuits are a single circuit originating from the same step down transformer. The existence of the zigzag transformer inby the point where the surface power conduits branch off from the underground power conduits makes no inherent change in the relationship of the voltage or transmission patterns of the system. The current passes through the zigzag transformer with no change of voltage. The existence of circuit breakers at the zigzag does not isolate the circuitry for underground equipment into a separate system in case of an electrical fault in the surface equipment. As MESA's expert testified:

Q. (Mr. Backley): I think it's fairly clear, is it not, Mr. Rinehart, that the particular circuit or system at Koppers-ton No. 1 as described in Petitioner's Exhibit A, does not have the grounding wire for the surface portion, is that not correct?

MR. RINEHART: Yes, sir. That's right.

Q. I see. What effect, if any, does this have on the overall system assuming a fault in the surface portion?

A. Anytime a fault occurs on the surface it directly affects the underground grounding circuit in that the grounding circuit underground is connected to the grounded side of the resistor, which the fault current that would flow under fault conditions on the circuit would come through the ground field at the source transformer, which would elevate the frames of the equipment underground.

Q. And when you're speaking of elevating the frames, what exactly does that mean?

A. That means that there would be a voltage appearing on the frames of the equipment. If you take a voltmeter, put one probe on the frame of the equipment, put it to earth, put a probe in there, you would get a voltage reading. The frames of the equipment would be elevated. (Tr. 229.)

Since faults on the surface facilities can result in higher voltage appearing on the frames of equipment underground it must be concluded that the surface and underground facilities at Eastern's mines are on the same high-voltage circuit. It is therefore found that the requirements of 30 CFR 75.802 apply

to Eastern's surface high-voltage equipment as well as the underground high-voltage equipment.

II. *Petition for Modification*

Before the Secretary may modify the application of a mandatory safety standard, Petitioner must show, by a preponderance of the evidence, that "an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard" or that "the application of such standard to such mine will result in a diminution of safety to the miners" (Section 301(c) of the Act).

Eastern submits that it has a "fundamentally safe electrical system at each of the subject six mines," and relies upon section 75.801 of the Regulations as the "safety touchstone" for evaluating its Petition for Modification.

Section 75.801 provides:

> The grounding resistor, where required, shall be of the proper ohmic value to limit the voltage drop in the grounding circuit external to the resistor to not more than 100 volts under fault conditions. The grounding resistor shall be rated for maximum fault current continuously and insulated from ground for a voltage equal to the phase-to-phase voltage of the system.

Eastern submits that if its (surface) earth-grounding system is kept at a maximum resistance of 2 ohms, no more than 100 volts could reach the frames of the circuit equipment (including underground equipment) in the event of a fault. On this basis, it submits that its proposed system is equally as safe as the wire-grounding standard in 30 CFR 75.802, since both systems would meet the section 75.801 "objective safety requirements" of 100 volts maximum exposure (Eastern's Brief, p. 25).

However, section 75.801 is a separate standard for the maximum risk of electric shock to miners, and it is not the same standard as that involved in Eastern's Petition for Modification. In this case, section 301(c) requires "an alternative method * * * which will at all times guarantee no less than the same measure of protection afforded the miners" by the standard in section *75.802*.

MESA and the Union contend that Eastern's proposed system of earth-grounding surface facilities will not guarantee at all times an equal or greater safety protection of the miners compared to the wire-grounding system required by the statutory standard (*i.e.*, section 308 (b) of the Act and 30 CFR 75.802). This issue between the parties boils down to a safety analysis and comparison of a wire-grounding system vs. an earth-grounding system (Eastern's proposal) for surface equipment at the affected mines. As indicated above, it is erroneous to conclude that the systems must be judged equal for safety purposes if they both comply with section 75.801. Rather, the safety protection afforded by section 75.802 must be carefully weighed against the Peti-

tioner's proposed "alternative method" to see whether Petitioner can guarantee at least "the same measure of protection" as 75.802.

Before making this analysis, it is important to note that the evidence shows that Eastern's existing system has not achieved a 2-ohm resistance level for surface facilities. Representative tests by MESA showed that various surface facilities had resistance levels far above 2 ohms, one as high as 8.3 ohms. Such figures could allow a fault current on the frames of surface and underground equipment far in excess of 100 volts in the event of a surface fault.

Eastern concedes that it has not achieved a 2-ohm level, but submits that if its petition is granted it will implement equipment changes and new procedures to achieve and maintain a 2-ohm standard for its earth-ground fields.

The evidence raises considerable doubt whether Eastern will be able to achieve this goal, since the conductivity of earth as a ground is subject to variation by many conditions not subject to control by the operator. The testimony of more than one witness substantiates this fact:

——Q. (Mr. Backley): Does earth grounding of itself vary?

A. (Mr. Criste, witness for Eastern): Yes, sir. It's subject to variation by many conditions.

Q. And what are some of those conditions, may I ask?

A. Moisture, contact with the grounding rods that you try to insert into rock material.

Q. Now, the variance in the grounding would do what, insofar as the resistance is concerned?

A. It could change. (Tr. 31, 32.)

——Q. (Mr. Backley): And I think the question then arises whether or not the earth as a ground varies with conditions. In other words . . . let me ask before I forget it. Does it vary Doctor?

A. (Dr. Stanek, witness for Eastern): Yes. It does. (Tr. 161–162.)

——Q. (Mr. Backley): Mr. Rinehart, are you familiar with the use of the earth as a ground?

A. (Mr. Rinehart, witness for MESA): Yes, sir.

Q. And may I ask you do you have an opinion as to the use as [sic] the earth as a ground of the mine electrical systems that we're discussing?

A. As it's been pointed [out] the earth is unreliable in the sense due to the temperature changes, weather changes, seasonal changes and other things, that it is unreliable as a grounding conductor. . . . (Tr. 242.)

Grounding wire is more predictable than an earth ground, a fact admitted by Mr. Ely, a witness for Eastern:

Q. (Mr. Widman, attorney for United Mine Workers of America): All right. [I] would suggest the wire is more predictable as far as the ohm maintenance than the earth ground?

A. Yes, it would be more predictable. (Tr. 89.)

Even if it were found that a 2-ohm standard were feasible and reliable in an earth-ground system, Eastern's proposal would necessarily subject the miners to a higher risk of injury. Thus, the parties are agreed that the wire-grounding of surface facilities would limit a fault current (on the frames of the underground equipment) to a voltage

lower than the voltage that would result if the earth were used as a ground for surface facilities. MESA's expert estimated that the current potential with a wire-grounding circuit would be a maximum of 50 volts on underground frames compared to a maximum of 90 volts if earth-grounding is used and a 2-ohm resistance level is maintained. Eastern's expert estimated the maximum voltage potential with wire-grounding to be 35–70 volts compared to 90 volts with earth-grounding. Although Eastern's figures differ somewhat from MESA's, I find that the preponderance of the reliable expert testimony establishes a minimum expected differential of 40 volts in the fault current on the frames of circuit equipment; that is, 50 volts potential for the wire-grounding system vs. 90 volts for Eastern's proposed earth-grounding system.

A differential of 40 volts cannot be said to be so slight as to qualify Eastern's proposal as one that "will at all times guarantee the same measure of protection" as the standard provided in section 75.802. In addition, the projected maximum exposure time (½ second) in the event of a fault under Eastern's proposed system depends upon its circuit breakers working effectively in an emergency. However, circuit breakers are not 100% reliable. Thus, if a circuit breaker failed in an emergency, the increased exposure time for a miner in contact with a fault current could produce a dangerously higher risk if the fault current were 90 volts vs. 50 volts.

On balance, it is concluded that Eastern has failed to meet its burden of proving that its proposed electrical system will at all times guarantee the same measure of protection as the standard required by 30 CFR 75.802, or that a diminution of safety protection would result from applying the standard to its mines.

FINDINGS OF FACT

Having considered the testimony, the documentary evidence, and the proposals and arguments of counsel, I find that the preponderance of the substantial, probative and reliable evidence establishes the following facts.

1. Notice of Violation No. 1 BEM (12/11/72) was issued to Eastern Associated Coal Corp. for a violation of section 75.802 of Part 75, Title 30, Code of Federal Regulations, which is a republication of section 308(b) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 868(b) (1970). The notice of violation, issued under section 104(b) of the Act, charged a violation at Eastern's Keystone No. 4 Mine, Raleigh County, West Virginia.

2. As a result of the issuance of Notice of Violation No. 1 BEM (12/11/72), Eastern filed with the Office of Hearings and Appeals an Application for Review in accordance with section 105(a)(1) of the Act. This application is designated HOPE 73–488.

3. The electrical systems at Eastern's Kopperston No. 1, Keystone Nos. 2 and 3, Federal No. 1, and Joanne Mines are similar to the system at Keystone No. 4, all having three-phase Delta connected power systems.

4. Due to the similar electrical distribution systems, Eastern also filed, in respect to those mines, a Petition for Modification of the application of section 75.802 of Part 75, Title 30 of the Code of Federal Regulations, said petition to be considered in the event that it is concluded in HOPE 73–488 that Eastern is in violation of section 75.802. The Petition for Modification, designated Docket No. M 73–23, was filed in accordance with section 301 (c) of the Act, with appropriate notice in the Federal Register.

5. Eastern's Delmont Mine was withdrawn from the Petition for Modification upon motion of Eastern.

6. At all pertinent times, the following conditions have existed at the Kopperston No. 1, Keystone Nos. 2, 3 and 4, Federal No. 1, and Joanne Mines, owned by Eastern:

(a) At each mine the surface electrical distribution system and the underground electrical distribution system are interconnected and interdependent.

(b) The six mines named all have three-phase Delta-Delta high-voltage electrical distribution systems. The distribution system, applicable to all six mines, involves the origination of electricity at a distant power source. An overhead transmission line transmits by three-phase conductors high-voltage electricity, 13,200 volts, to a main substation transformer where the voltage is stepped down to 4,160 volts. From the main substation, the 4,160 volt overhead transmission line separates and feeds power to a mine substation (located, in each mine, a substantial distance from the main substation) and to surface facilities which are located at various points (*e.g.*, out to a distance of 4,000 feet at Federal No. 1). These surface facilities are earth grounded. The high-voltage conductors which feed the mine substation pass through a zigzag or neutral-deriving transformer. There is no reduction or transformation of electric power at this station. The zigzag transformer is installed primarily for the purpose of deriving a neutral for the power conductors which go underground. A grounding wire from the underground equipment is connected to the grounding resistor at the zigzag transformer, but there is no grounding wire from the surface equipment to the derived neutral at the zigzag transformer.

7. The earth is used as the ground conductor for all surface equipment served by the high-voltage circuit at the mines.

8. A ground wire is used as the ground conductor for all underground high-voltage equipment in the mines.

9. Eastern's power system, at each mine, is designed to limit a fault current to 50 amperes by use of a 50-ampere pure resistor.

10. If the resistance in Eastern's earth grounds were limited to 2 ohms or less the fault voltage, in the case of a phase-to-ground or phase-to-neutral fault, would not exceed 100 volts on the frames of underground equipment.

11. The earth as a ground is subject to variation by many conditions, a situation which can result in a change in resistance rather easily.

12. Grounding wire is more predictable than an earth ground in maintaining the desirable two ohms or less resistance at the mines.

13. Grounding wire therefore offers a safer electrical system than does the earth grounding system proposed by Eastern.

14. Eastern's existing electrical distribution systems have not achieved a maximum earth-ground resistance of 2 ohms, but substantially exceed that level.

15. Circuit breakers are not 100% reliable.

16. Even assuming a 2 ohm resistance level, in the event of a phase-to-ground fault on the surface the standard set out in section 75.802 (*i.e.*, wire grounding) would result in lower voltage on underground equipment frames than would a fault under Eastern's proposed system, specifically, a differential of 50 volts vs. 90 volts. The mandatory safety standard, therefore, provides a higher degree of safety than that proposed by Eastern. The same applies to a phase to neutral fault.

17. In the electrical profession the word "source" means a source of energy.

18. As used at Eastern's mines, its zigzag transformer is not a source of energy, and is not a "source transformer" as that term is used in the applicable regulation and statutory provision.

19. All statements of fact in the Discussion part of this Decision are hereby incorporated herein as Findings of Fact.

20. All proposed findings of fact inconsistent with the above are hereby rejected.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the subject matter and the parties in the above-cited proceedings.

2. Eastern's Kopperston No. 1, Keystone Nos. 2, 3 and 4, Federal No. 1, and Joanne Mines all produce coal for sales in or affecting interstate commerce.

3. Under section 301(c) of the Act, a petition for modification may be approved only upon a determination that an alternative method exists which will at all times guarantee no less than the same measure of protection afforded miners by the standard proposed to be modified, or upon a determination that application of such standard to the mines in question will result in a diminution of safety protection of the miners at such mines.

4. A "source transformer" within the meaning of 30 CFR 75.802 is a power transformer which supplies power to the electrical circuit; it

does not refer to the "source" of the neutral.

5. Section 75.802 applies to all surface equipment on a high-voltage circuit served by a source transformer, if the circuit also extends underground.

6. The grounding circuit required by section 75.802 is required inby the direct or derived neutral which is to be grounded through a suitable resistor located at the source transformer. The resistance grounded neutral is to be located in close proximity to the power source.

7. The Inspector properly construed section 75.802, and Notice of Violation No. 1 BEM (12/11/72) was properly issued and is valid.

8. The zigzag transformer at each of Eastern's mines involved herein is not a "source transformer" within the meaning of section 308(b) of the Act and 30 CFR 75.802.

9. The Government has met its burden of proving a violation of 30 CFR 75.802 as alleged in Notice of Violation 1 BEM, dated December 11, 1972.

10. Eastern has failed to meet its burden of proving that its proposed alternative grounding system will at all times guarantee the same measure of safety protection of the miners as the standard provided in section 308(b) of the Act and 30 CFR 75.802, or that the application of such standard to its mines will result in a diminution of safety protection of the miners employed at such mines.

11. All conclusions of law in the Discussion part of this Decision are hereby incorporated herein as Conclusions of Law.

12. All proposed conclusions of law inconsistent with the above are hereby rejected.

ORDER

WHEREFORE, IT IS ORDERED that:

1. The Application for Review in Docket No. HOPE 73-488 is hereby DISMISSED and the Notice of Violation cited therein is AFFIRMED.

2. The Petition for Modification in Docket No. M 73-23 is hereby DISMISSED.

3. Paragraph 2 of the Order dated January 18, 1973, temporarily restraining MESA from enforcing section 308(b) of the Act and 30 CFR 75.802 at the mines named in the Petition for Modification, is hereby TERMINATED.

WILLIAM FAUVER,
Administrative Law Judge.

EASTERN ASSOCIATED COAL CORPORATION

4 IBMA 298

Decided *June 27, 1975*

Appeal by the Mining Enforcement and Safety Administration (MESA) from a decision by Administrative Law Judge Joseph B. Kennedy (Docket No. HOPE 73-663), dated February 12, 1974, granting an Application for Review filed by Eastern Associated Coal Corporation and vacating an Order of Withdrawal issued pursuant to section

104(a) of the Federal Coal Mine Health and Safety Act of 1969 [1] hereinafter "the Act."

Affirmed in part, and reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Generally

Vacation or termination of a section 104 (a) order of withdrawal by MESA does not preclude review of such order where timely application therefor is made pursuant to section 105 of the Act.

2. Federal Coal Mine Health and Safety Act of 1969: Hearings: Powers of Administrative Law Judges

An Administrative Law Judge exceeds his authority in ordering MESA to cease and desist issuance of section 104(a) orders of withdrawal.

APPEARANCES: Robert W. Long, Esq., Associate Solicitor, Richard V. Backley, Esq., Assistant Solicitor, and Robert A. Cohen, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; Thomas E. Boettger, Esq., for appellee, Eastern Associated Coal Corporation; Guy Farmer, Esq., for intervenor, Bituminous Coal Operators' Association.

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

The undisputed facts, as found by the Administrative Law Judge (Judge) based on a stipulated record, are in pertinent part as follows:

A fatal haulage-type accident occurred at Eastern Associated Coal Corporation's (Eastern) Keystone No. 4 Mine at 7:40 p.m., April 24, 1973. Eastern immediately notified MESA of the accident in accordance with section 103(e) of the Act, and a MESA inspector arrived at the mine shortly thereafter. In the interim, all miners withdrew from the mine to observe the traditional 24-hour memorial period.

Without conducting an investigation or inspection, the inspector immediately issued an Order of Withdrawal pursuant to section 104(a) of the Act which stated that based upon an inspection of the above mine on April 24, 1973, the following condition constituted an imminent danger:

> A track haulage type accident that resulted in a fatality has occurred at this mine; therefore, this Withdrawal Order is issued for investigation purposes.

On the following day, MESA conducted an investigation of the accident, and no violations of the Act having been found, the Order was modified to permit resumption of mining operations. Thereafter, on May 18, 1973, MESA vacated the Order, finding that the accident was not the result of any failure on the part of mine management to comply with the Act or regulations.

On May 20, 1973, Eastern filed a timely Application for Review of the April 24 Order. After consideration of a stipulated record, certain

[1] 30 U.S.C. §§ 801–960 (1970).

documentary exhibits, and oral argument, the Judge issued his decision on February 12, 1974. In this decision the Judge granted Eastern's Application for Review, vacated the instant Order based upon his finding that it was not premised on a finding of imminent danger, and ordered MESA to cease and desist issuing section 104(a) imminent danger orders of withdrawal in similar circumstances where no previous inspection takes place to determine if in fact imminent dangers exist. It is from this decision and order that MESA appeals to the Board.

Contentions of the Parties on Appeal

On appeal, MESA reaffirms the position taken at the hearing that its vacation of the Order rendered it null and void *ab initio*, and that the Judge should have dismissed the Application for Review because he could grant no additional relief; *i.e.*, there was nothing to support legal review. MESA argues that since it had, in effect, rescinded the inspector's finding of imminent danger and by its vacation of the Order was not alleging any violation of the Act or regulations, there could not be a section 109 penalty proceeding arising from the condition cited in the Order. MESA further contends that it finds authority to vacate orders under section 104(g) of the Act authorizing modification or termination of notices and orders. Finally, MESA contends that the Judge has no authority to issue cease and desist orders in matters of MESA's enforcement policies and responsibilities to issue notices and orders.

Eastern contends that MESA's vacation of the Order does not render its application moot for the reason that it has a statutory right of review of such orders, if for no other reason than to seek a Departmental ruling which would prevent the improper repetitious issuing of section 104(a) orders in similar situations, *i.e.*, not based upon imminent danger. The Bituminous Coal Operators' Association (BCOA), appearing before the Board as *amicus curiae*, agrees with Eastern and argues that the use of 104(a) orders by MESA in control situations such as this is improper under the Act and violative of the rights of operators, particularly inasmuch as the Act provides a proper remedy under section 103(f) for issuance of control orders after an accident in the mine.

Issues Presented

Whether the Judge erred in refusing to dismiss Eastern's Application for Review of an Order of Withdrawal where MESA had vacated the Order prior to the filing of such Application.

Whether the Judge erred in holding that MESA lacks authority to vacate section 104(a) orders of withdrawal.

Whether the Judge has authority to order MESA to cease and desist issuing section 104(a) orders for

protective purposes in factual situations similar to that presented in the instant case.

Discussion

[1] Section 104(g) of the Act grants MESA, as authorized representative of the Secretary, authority to *modify* or *terminate* any section 104 notice or order, except an order issued under subsection (h). This Board stated in *Reliable Coal Company*, 1 IBMA 50, 65, 78 I.D. 199, 207, 1971–1973 OSHD par. 15,368 (1971) that:

> * * * where it clearly appears that a *notice* has been mistakenly issued or may be found, without the necessity of a hearing, to be fatally defective or invalid on its face, such notice should, of course, be withdrawn, canceled, or *vacated* at the earliest practicable point in the administrative process, notwithstanding the fact that an application for its review may also be subject to dismissal * * * [I]f such cases of patent invalidity are not rectified at the Bureau [MESA] level, it is always within the power of an Examiner (or the Board) to issue rulings and orders to bring about a prompt, just, and practical disposition of the matter. * * * (Italics added.)

Our language in *Reliable*, *supra*, makes clear our opinion that MESA may properly *vacate* a section 104(b) *notice;* however, we were not there required to, and did not deal with the question of MESA's authority to vacate orders of withdrawal or the operator's right to review of such vacated *orders*, or the question of mootness as raised in the instant case.

The rationale of our conclusion in *Reliable*, *supra*, was simply that when MESA *vacates* a notice of violation, it is giving the operator all the relief it could obtain by review of the notice, *i.e.*, the issue of the time permitted for abatement becomes moot; no violation is charged and no penalty can be assessed. However, we do not believe this same rationale is applicable to withdrawal orders issued pursuant to section 104. Section 105(a) of the Act grants both the operator and representative of the miners the right to seek review of any *order* or its modification or termination, issued pursuant to section 104. We hold that this right of review must be safeguarded and cannot be frustrated by unilateral action of MESA. In the instant case vacation of the Order, as defined by MESA, would deprive both the operator and the representative of miners of any opportunity to seek Secretarial review of the validity of a section 104 withdrawal order as and when issued or the validity of a subsequent order modifying or terminating such Order. We cannot be unmindful of the consequences which flow from the *issuance* of an order withdrawal under section 104 of the Act, particularly as seen in the provisions of sections 104(c) and 110 of the Act, as well as the immediate loss of production to the operator, whether or not issuance of the order was improvident. We believe such action and any subsequent action by MESA with respect to that order, be it modification, termination, or vacation, is reviewable pursuant to section 105 of the Act, if such review

is timely sought by the operator or representative of the miners. We do not hold that MESA has no authority to vacate an order, for in many instances this may be the most expeditious method of accomplishing a desired result and it may in many instances be the preferable remedy for the operator. What we do hold is that MESA by "vacating" an order may not thereby deny an operator or representative of miners the right of review of the basic order or any subsequent orders. Insofar as the right of review is concerned, vacating an order has no more implication than the termination of an order. For review purposes, a vacated order is a terminated order. In the instant case, since MESA has admitted that no imminent danger existed at the time the instant Order was issued, we must affirm the Judge's finding as to lack of imminent danger and his conclusion that the Order must be vacated for that reason.

[2] *In Clinchfield Coal Company*, 3 IBMA 154, 159, 81 I.D. 276, 278, 1973–1974 OSHD par. 17,812 (1974), we stated that, "* * * this Board does not have authority to interfere with MESA as the enforcement arm of the Secretary in its application of the informal assessment procedure." We have more recently stated in *Eastern Associated Coal Corporation*, 4 IBMA 1, 82 I.D. 22, 1974–1975 OSHD par. 19,224 (1975), that an Administrative Law Judge does not possess general supervisory power over the enforcement activities of MESA. This limitation of authority applies equally to Administrative Law Judges and the Board.

An order to cease and desist imposes a prior restraint upon the enforcement obligations of MESA. Such prior restraint power in the Judges and this Board would require some power to enjoin and the concomitant authority to enforce. Such power or authority has not been given to the Administrative Law Judges or this Board. The extent of the Board's authority is the *review of past actions* of the enforcement arm, MESA. Nevertheless, it must be recognized that a decision rendered by the Board upon review is final for the Department and as such represents a Secretarial determination on the question in issue. 43 CFR 4.1(4) and 43 CFR 4.500. It is to be expected that such determination of either law or policy would be followed by administrative and enforcement officers of this Department unless changed by rule or by subsequent adjudicative decision. Accordingly, we hold that neither the Board nor the Judge has authority to order MESA to cease and desist from issuing whatever notices and orders it deems necessary and appropriate in carrying out enforcement responsibilities under the Act.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY

ORDERED that the decision in the above-captioned case IS AFFIRMED in part and REVERSED in part in accordance with the foregoing opinion.

C. E. ROGERS, JR.,
Chief Administrative Judge.

I CONCUR:

DAVID DOANE,
Administrative Judge.

ATLANTIC RICHFIELD COMPANY

21 IBLA 98

Decided *June 30, 1975*

Appeal from the decision (GS-56-O&G) of Director, Geological Survey, affirming the determination of the Oil and Gas Supervisor requiring the payment of prejudgment interest on royalties.

Affirmed.

1. Contracts: Disputes and Remedies: Damages: Measurement—Oil and Gas Leases: Royalties

Even where statute, regulation, and the oil and gas lease itself do not specifically provide for the payment of prejudgment interest on royalties owed to the United States, such interest may be imposed by the United States; equity principles may authorize such imposition. A charge for such interest may be imposed despite delays in processing the debtor's appeals, where the debtor assertedly relied upon an earlier Departmental decision which, only when taken out of context, would tend to support the debtor's posture.

2. Contracts: Disputes and Remedies: Damages: Generally—Contracts: Disputes and Remedies: Jurisdiction—Geological Survey—Oil and Gas Leases: Royalties

An Oil and Gas Supervisor of the Geological Survey has authority to demand prejudgment interest based upon the failure of an oil and gas lessee to pay timely royalties owed to the Government, despite the fact that the Supervisor is an employee of the Executive Branch.

3. Appeals—Geological Survey—Oil and Gas Leases: Royalties—Oil and Gas Leases: Suspensions

Where an oil and gas lessee appeals from a decision of an Oil and Gas Supervisor's determination that additional royalties are due to the Government, and simultaneously files a request for suspension of the ruling, which is granted by the Geological Survey "until further notice," prejudgment interest continues to accrue during the period of the suspension. This conclusion is premised on the doctrine that interest is compensation for delay in payment.

4. Courts—Geological Survey—Oil and Gas Leases: Generally—Oil and Gas Leases: Royalties

A demand by the Geological Survey for prejudgment interest for delayed payment of additional royalties owed to the Government is not necessarily unenforceable in the courts because it was not asserted as a counterclaim under Rule 13(a) of the Federal Rules of Civil Procedure.

APPEARANCES: Robert A. Dick, Esq., John P. Akolt, Jr., Esq., Rex Short,

Esq., and Hunter L. Johnson, Jr., Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Atlantic Richfield Company (appellant) has appealed from the decision of the Director, Geological Survey (Director), dated September 3, 1974, which affirmed the determination[1] of the Regional Oil and Gas Supervisor (Supervisor), Casper, Wyoming, dated December 29, 1971, requiring appellant to pay to the United States additional royalties in the amount of $4,723,330.08, which together with the prejudgment interest demanded, aggregated $6,864,456.41. The leases for which additional payments were demanded are: Cheyenne 029630 (a), 029630(b), 063724, 065546, 065920, 070341, and 078819, all covering lands in the Lost Soldier Field, Wyoming. Appellant asserts that the additional royalties have been paid to the Government. Therefore, only the interest is at issue.

The sequence of events is succinctly set forth in appellant's brief as follows:

(a) Oil and Gas Supervisor's letter dated November 22, 1961, recomputing

[1] The determination of the Regional Oil and Gas Supervisor, in pertinent portions is set forth below:

"We have determined the amount of additional royalties which had accrued as of March 31, 1971, on each of your Lost Soldier oil and gas leases, including those which were the subject of the litigation and four leases which, although not specifically made subject to that litigation, come within the same category for purposes of royalty settlement. Upon your adjustment of royalty accounting procedures, no additional royalties accrued in this regard after March 31, 1971. Our findings as to the amount of additional royalties due to the United States are as follows:

Cheyenne:	
029630(a)	$2,247,373.03
065546	2,474,587.83
063724	667.95
029630(b)	242.98
065920	381.67
070341	73.88
078819	2.74
Total	$4,723,330.08

We find that the total amount of money due with interest to the United States on account of those additional royalties, which had not been paid when due, is $6,864,456.41. That amount includes additional royalties due, together with interest on the outstanding balance, which has been *computed* on an annual basis (on a monthly basis since November 1970) at the prevailing prime interest rate for each period. Interest on all amounts due as of October 31, 1970, has been computed beginning with the annual interest on the additional royalties that had accrued as of September 30, 1961, which was the royalty balance requested in our letter to your predecessor company, dated November 22, 1961, and has been *computed* on an annual balance of royalties due, including the accrual of additional royalties for each year or part year. That interest has been computed through March 22, 1971, the date on which the Geological Survey received Atlantic Richfield Company's tender of its check in the amount of the accrued royalties for which settlement had not been made. Interest on additional royalties which accrued during the period from November 1, 1970, to March 31, 1971, has been computed on the same basis through December 1971. The prime interest rates prevailing during all periods are taken from a table secured from the Denver Branch of the Federal Reserve Bank. Where the rate changed within a calendar year, a weighted average annual rate was employed.

"Your check in the amount mentioned above ($6,864,456.41) should be made payable to the order of the United States Geological Survey, and sent to P.O. Box 2859, Casper, Wyoming 82601. Should you have any questions concerning the amount we have determined to be due to the United States, or concerning our method of computation, we shall be happy to discuss the matter with you."

and adjusting royalties on production from the Madison and Cambrian Zones underlying Cheyenne lease 029630(a) and the Cheyenne lease 065546 (lands located in the Lost Soldier Field, Wyoming).

(b) Sinclair Oil and Gas Company (Sinclair) predecessor of Atlantic Richfield Company (Arco) appealed the Supervisor's royalty computation to the Director, filing its final appeal documents on or about January 24, 1962.

(c) On July 29, 1966, the Director, by Decision GS–37–O&G, affirmed the Supervisor's computation of additional royalty.

(d) Sinclair appealed the Director's aforesaid Decision GS–37–O&G to the Secretary, whose Decision (A–30709–75 I.D. 155 (1968)) affirming the Director's Decision was issued June 20, 1968.

(e) Sinclair, in October 1968, instituted an action in The United States District Court for the District of Wyoming (No. 5277-Civil) in which it sought judicial relief from the various departmental Decisions.

(f) On August 22, 1969, in the above referred to action, Judge Ewing T. Kerr granted Defendant's Motion for Summary Judgment which, in effect, was an affirmation of prior departmental Decisions.

(g) The aforesaid District Court Decision was affirmed by The United States Court of Appeals, Tenth Circuit (decision dated October 13, 1970) *Atlantic Richfield Company, Walter J. Hickel, Secretary of the Interior, et al.*, 432 F. 2d 587 (10th Cir. 1970).

(h) Oil and Gas Supervisor's letter dated February 17, 1971, to Arco computing additional royalties, payable as of October 31, 1970 ($4,652,873.58).

(i) Arco's letter of March 18, 1971, to Mr. C. J. Curtis, Geological Survey, U.S. Department of the Interior, P.O. Box 2859, Casper, Wyoming 82601, enclosing a check payable to United States Geological Survey in the amount of $4,652,873.58 in payment of recomputed additional royalties as of October 31, 1970.

(j) Regional Petroleum Accountant's letter dated March 23, 1971, to Arco returning the March 18, 1971, tendered payment, with instructions to withhold further payment until formal billing received.

(k) Oil and Gas Supervisor's letter dated December 29, 1971, to Arco constituting formal billing of the recomputed royalties as of March 31, 1971, and the initial demand for interest in the amount of $2,141,126.33, computed at prime interest rates through December 1971.

The controversy as to the propriety of additional rentals had its genesis in a letter from the Supervisor to appellant's predecessor in interest, Sinclair Oil and Gas Company (Sinclair), dated November 22, 1961. That letter advised Sinclair that the Supervisor had been instructed to recompute the royalties on production for the period of April 1, 1948, to September 30, 1961. The recomputation showed that Sinclair owed the sum of $3,209,763.90 in additional royalty payments. *See Sinclair Oil & Gas Co.*, 75 I.D. 155, 157 (1968). We now turn to consideration of appellant's statement of reasons for its appeal to this Board.

[1] Appellant asserts that, although the Director conceded that no statute or contract authorized the Supervisor to demand interest, the Director erred in determining that equity principles justified the Supervisor's demand for interest. Appellant further asserts that it would be "a miscarriage of justice" to demand interest in view of the fact that appellant and Sinclair had been seeking administrative appellate and judicial construction of

the Mineral Leasing Act on an issue which the Department itself had recognized in *Richfield Oil Corp.*, 62 I.D. 269, 273 (1955),[2] as "susceptible" of the interpretation advanced by Richfield. Moreover, appellant asserts that the Director erred in determining that equity principles justified the Supervisor's demand for interest. In this connection, appellant points to the four and one-half years it took for the Director to decide its appeal and the 21 months which elapsed between the time of perfecting its ap-

[2] The issue in *Richfield* is described at 62 I.D. 272–74 as follows:

"In support of its contention that production from the zones here involved is subject to the 12½ percent royalty rate under item (1) of section 12, the appellant asserts that although these zones are within the same horizontal limits as are zones which are known to have been productive on August 8, 1946 (the 'Old upper' and 'Old lower' zones referred to in the Acting Director's determination), the zones here under consideration are situated below the vertical level of the productive limits of the Old upper and Old lower zones and are therefore entitled to the flat 12½ percent royalty rate as provided in item (1) of section 12. The appellant contends that the Acting Director's failure to grant the 12½ percent royalty rate as to the zones involved in this appeal indicates that the statutory phrase 'productive limits of any oil or gas deposit' in item (1) of section 12 was construed by the Acting Director of the Geological Survey to mean 'horizontal productive limits of any oil or gas deposit.' In other words, the appellant asserts that the Acting Director has in effect outlined on the surface of the ground the horizontal limits of the Old upper and Old lower zones and has taken the position that any oil and gas deposit lying within those horizontal limits must be considered to be within the productive limits of the Old upper and Old lower zones even though the deposit is in an entirely separate zone lying either above or below the Old upper and the Old lower zones and not coming within the vertical productive limits of these two zones.

"The issue on this appeal therefore is whether the 'horizontal limits' interpretation apparently followed by the Geological Survey or the 'vertical limits' interpretation contended for by the appellant is correct.

"The language of item (1) of section 12 is not too clear. It grants the flat 12½ percent royalty rate to production from

* * * such leases, or such part of the lands subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on the effective date of this Act * * *.

Viewed by itself, this language is possibly susceptible of the interpretation advanced by the appellant.

"On the other hand, particularly when viewed as against the language employed in items (2) and (3) of the same section, item (1) is more reasonably construed as the Acting Director has construed it. Both items (2) and (3) grant the flat 12½ percent royalty rate to 'any production * * * from an oil or gas deposit * * * which is determined by the Secretary to be a new deposit.' This language plainly shows that in making a determination under item (2) or (3), the Secretary is to act only upon the basis of 'deposits.' That is, in acting upon a request under either item (2) or (3) for a determination that the flat 12½ percent royalty rate be granted to production from a certain deposit, the Secretary determines only whether the deposit in question is a new deposit separate and distinct from any other deposit previously discovered. It necessarily follows that if the deposit in question is vertically separated from an existing deposit, it comes within item (2) or (3) regardless of whether it falls within vertical extensions of the horizontal limits of the existing deposit.

"The language of item (1) is distinctly different. It does not extend the flat 12½ percent royalty rate to production from a 'deposit'; it extends the flat royalty rate to production from 'such *leases*, or such part of the *lands* subject thereto, and the deposits underlying the same, as are not believed to be within the productive limits of any oil or gas deposit' [Italics supplied], as such limits existed on August 8, 1946. Moreover, it is to be noted that item (1) says *'such* leases, or *such* part of the lands subject thereto, and *the* deposits underlying the same, *as* are not believed,' etc. [Italics supplied.] It does not say 'such deposits.' The flat 12½ percent royalty is to be extended only to such leased *land* as is not within the productive limits of an existing deposit, and not to such *deposits* as are not within the productive limits of an existing deposit. Accordingly, it seems plain that the Secretary is required to determine only whether the leased *land*, or part of it, lies within the productive limits of a deposit in existence on August 8, 1946. This clearly

peal to the Department and the rendition of the Department's decision. Appellant also points to the necessary time consumed in getting a judicial determination and suggests that *Board of County Commissioners* v. *United States*,[3] 308 U.S. 343 (1939), is dispositive of the basic issue.

Appellant's arguments implicitly recognize that even in the absence of statutory or contractual authority, interest may be imposed where principles of equity warrant such imposition. In other words, the issue whether interest is properly chargeable in the case at bar turns upon a determination whether such charge would be equitable. We look at the totality of the circumstances to ascertain whether they warrant the imposition of prejudgment interest.

While it is true that in *Richfield Oil Corp.*, *supra* at 273, the Department stated that "*viewed by itself*, this language is *possibly* susceptible of the interpretation advanced by the appellant" (Italics supplied), the Department discussed *in extenso* the cogent reasons which impelled a contrary result. Thus we have an authoritative and definitive opinion on the issue in *Richfield*, limned by the highest legal officer of the Department in 1955. Appellant's purported reliance on a phrase, taken out of context, and negated by a subsequent articulate and detailed discussion, is a weak reed on which to claim reliance. This is particularly true in the light of the fact that demand for the additional royalties was made to Sinclair (appellant's predecessor in interest) on November 22, 1961—some six and one-half years after the issuance of *Richfield*.

Appellant's posture that the time consumed in obtaining appellate administrative decisions and court review makes inequitable the demand for prejudgment interest overlooks a cogent consideration. Sinclair could have paid promptly the money for additional royalties demanded by the Supervisor on November 22, 1961, accompanied by a protest against such imposition. It chose not

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conveys the idea that the Secretary is only required to determine whether the leased land lies within the horizontal limits of any existing deposit. This interpretation is incorporated in the departmental regulation quoted earlier which was adopted shortly after the enactment of the [a]ct of August 8, 1946 (see 43 CFR, 1946 ed., 192.82(a)(3)). I refer to the provision that the flat 12½ percent royalty rate shall apply to production from '(1) *Land* determined by the Director, Geological Survey, not to be within the productive limits of any oil or gas deposit on August 8, 1946.' [Italics supplied.]

"The inclusion in item (1) of the phrase 'and the deposits underlying it' also bears out this conclusion. That is, item (1) seems to say that only where the leased land *and all the deposits underlying it* are not within the productive limits of a deposit found to exist on August 8, 1946, will the lessee be entitled to the flat royalty rate. This negates the idea that item (1) applies to leased land where one or more of the deposits underlying the land have been found to be in existence on August 8, 1946. If Congress had intended that meaning for item (1), it would seem that Congress would have simply followed the language used in items (2) and (3): that is, item (1) would have been worded as follows:

[The flat royalty rate shall extend to] (1) any production on a lease from an oil or gas deposit which is not believed to be within the productive limits of any oil or gas deposit, as such productive limits are found by the Secretary to exist on the effective date of this Act.

"Although the legislative history of section 12 is rather inconclusive, it lends support to the 'horizontal limits' interpretation." * * *

[3] Referred to in appellant's brief as *Jackson County* v. *United States*.

to do so, despite the clearly enunciated holdings in *Richfield* in 1955. Thus it appears that appellant (and its predecessor in interest) chose to utilize the funds rather than pay them to the United States, based on the hope that the reasoned administrative interpretation of 30 U.S.C. § 226(c) (1946) could be successfully challenged. It seems equitable that the United States should be recompensed for the loss of the use of the funds due it.[4]

Appellant asserts that *Board of County Commissioners* v. *United States*, *supra*, is dispositive of the threshold issue in its favor. That case involved the following facts: an Indian allotment, by treaty stipulation and provisions of a trust patent issued under the General Allotment Act, was exempt from taxation so long as the United States should hold it in trust. Over the Indian's objection, the Secretary of the Interior issued to the Indian a patent in fee simple which, later after long delay, the Secretary canceled by authority of an Act of Congress. In the meantime the fee patent had been registered in the county and, the county authorities in reliance upon it, had collected taxes upon the land. Thereafter, the United States in an action on behalf of the Indian recovered a judgment against the county for the amount of the tax payments with interest.

The Supreme Court reversed the District Court decision, stating in part:

> Assuming, however, that the law as to interest in governmental actions based upon quasi-contractual obligations be applicable, the United States must fail here. The cases teach that interest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to considerations of fairness. It is denied when its exaction would be inequitable. *United States* v. *Sanborn*, 135 U.S. 271, 281; *Billings* v. *United States*, 232 U.S. 261.
>
> Jackson County in all innocence acted in reliance on a fee patent given under the hand of the President of the United States. Even after Congress in 1927 authorized the Secretary of the Interior to cancel such a patent, it was not until 1935 that such cancellation was made. Here is a long, unexcused delay in the assertion of a right for which Jackson County should not be penalized. By virtue of the most authoritative semblance of legitimacy under national law, the land of M-Ko-Quah-Wah and the lands of other Indians had become part of the economy of Jackson County. For eight years after Congress had directed attention to the problem, those specially entrusted with the intricacies of Indian law did not call

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[4] 4 CFR 102.10 states in part that "Prejudgment interest should not be demanded or collected on civil penalty and forfeiture claims unless the statute under which the claim arises authorizes the collection of such interest." The interest sought in the case at bar is sought simply to recompense the United States for the use of funds due it.

That regulation, however, also provides, "In cases in which prejudgment interest is not mandated by statute, contract or regulation, the agency *may* forego the collection of prejudgment interest as an inducement to voluntary payment." (Italics supplied.) Thus the regulations of the General Accounting Office implicitly recognize that prejudgment interest may be collected in the discretion of the federal agency to which the debt is owed, with certain exceptions not pertinent in the case at bar.

Regulations adopted pursuant to, and conforming with, proper authority have the force and effect of law. *See Frank Allison*, 3 IBLA 317 (1971). A regulation must be deemed valid unless it is shown to be "plainly and palpably inconsistent with law." *Boske* v. *Comingore*, 177 U.S. 459, 470 (1900).

Jackson County's action into question. Whatever may be her unfortunate duty to restore the taxes, which she had every practical justification for collecting at the time, no claim of fairness calls upon her also to pay interest for the use of the money which she could not have known was not properly hers.

308 U.S. 343, 352–53 (1939).

In contradistinction to Jackson County, which "in all innocence acted in reliance on a fee patent given under the hand of the President of the United States," appellant's claim to bona fides is vitiated by the *Richfield* Departmental decision in 1955 which established an interpretation of the Mineral Leasing Act diametrically contrary to appellant's contention. Lifting the italicized portions from "[*v*]*iewed by itself*, this language is *possibly* susceptible of the interpretation advanced by the appellant" hardly comports with acting "in all innocence * * * in reliance on a fee patent given under the hand of the President * * *." The case at bar is further distinguishable in that demand for interest commenced only after the debtor was apprised of his obligation. The Geological Survey is seeking interest only for the period commencing November 22, 1961, the date of its letter notifying appellant of the additional royalties due. The Geological Survey is not seeking interest for the royalties which accrued from 1948 to 1961, prior to its demand.

[2] Appellant asserts that the Supervisor is without authority "to compute interest on the additional royalties paid and to demand payment of such interest." (Statement of Reasons at 15.) Appellant's conclusion is predicated on the argument that prejudgment interest may be assessed only by the judiciary, that the Supervisor is an officer of the Executive Branch and not in the judiciary, and therefore has no authority to impose prejudgment interest. Appellant's basic assumption is that *only* the judiciary may impose prejudgment interest, but it points to no substantial authority for its assumption. While it is true that court suit might be necessary to *enforce* the payment of interest, Government personnel administering contracts (an oil and gas lease is a contract) may make a "unilateral determination" of interest [5] owed to

[5] A somewhat similar case to the one at bar related to the interpretation of the Department's leases for the mining and production of potash, under the Potassium Act of February 7, 1927, 30 U.S.C. § 282 (1964). The Department's interpretation was approved in *United States* v. *Southwest Potash Corp.*, 352 F.2d 113 (10th Cir. 1965), *cert. denied*, 383 U.S. 911 (1966), and the case was remanded to the District Court of New Mexico "with directions to proceed accordingly." The action had originated in the United States District Court for the District of New Mexico by a suit for recovery of the royalties due to the United States. After the denial of the petition by Southwest Potash for writ of certiorari by the Supreme Court, attorneys for Southwest Potash requested that the amount of royalties due the United States under the mining supervisor's determination be computed as promptly as possible. Interest was computed from the date the royalty amounts became due. See memorandum to Chief, Conservation Division, Geological Survey, from Associate Solicitor, Division of Public Lands, dated March 21, 1966. Judge Bratton of the District Court assessed interest against Southwest until April 1966, under his Judgment of Mandate and Final Judgment. *United States* v. *Southwest Potash Corp.* (D.N.M., filed Apr. 21, 1966).

the Government, subject to revision in "the discretion and judgment of the district court." *Swartzbaugh Mfg. Co.* v. *United States*, 289 F.2d 81, 84 (6th Cir. 1961).

The Director's holding that the delegation of authority to the Supervisor to make determinations of royalty liability, 30 CFR 221.3, includes authority to assess interest on delinquent royalty payments adequately disposes of appellant's contrary assertion and meets with our approbation. We note, moreover, that the Supervisor's demands for unpaid delinquent royalties and interest therein have been ratified in essence by the Director's decision of September 3, 1974.

[3] Appellant argues that the unconditional suspension of demand for payment of disputed additional royalties effectively suspends accrual of interest. This suspension arose from a request by Sinclair simultaneously filed on December 12, 1961, with its notice of appeal to the Director from the Supervisor's determination of November 22, 1961, that additional royalties were due to the Government. The Director's letter of December 29, 1961, suspended the Supervisor's ruling "until further notice." This suspension did one thing only—it relieved Sinclair of the obligation to pay the $3,209,763.30 additional royalties "until further notice." In no sense did it purport to relieve Sinclair (and its successor in interest) from being liable for the interest on the money withheld from the Government since 1961. At that time, interest had not been demanded from Sinclair. Interest "is customarily allowed as compensation for delay in payment." *Brooklyn Bank* v. *O'Neil*, 324 U.S. 697, 715 (1945).

In *United States* v. *Eastern Air Lines, Inc.*, 366 F. 2d 316, 321 (2d Cir. 1966), the Court states:

> It is well established that a party who has had the use of disputed funds for a period of time must pay interest on that portion of the funds finally determined to belong to his adversary. E.g., United States v. Royal Indem. Co., 116 F. 2d 247, 249 (2 Cir. 1940), aff'd, 313 U.S. 289, 61 S. Ct. 995, 85 L. Ed. 1361 (1941). * * *

The Court went on to point out that even a tender does not necessarily stop the running of interest and discussed the relative equities of the parties.

[4] Appellant also urges that the Government's failure to assert the claim for interest by way of counterclaim in the declaratory judgment action involving the additional royalties payable on oil production from the Madison and Cambrian Zones underlying leases Cheyenne 029630(a) and Cheyenne 065546 bars recovery of interest. Appellant relies upon Rule 13 (a) of the Federal Rules of Civil Procedure as the basis for its position and asserts that prejudgment interest is a "counterclaim" which must be pleaded or is considered waived.

We are not persuaded by the cases cited by appellant. None of them relates to the specific issue whether

prejudgment interest, not counterclaimed in proceedings in the federal courts, is waived.

The only case we have found which is directly on point awarded prejudgment interest, even though not included in a counterclaim, *Soderhamn Mach. Mfg. Co.* v. *Martin Bros. Container & Timber Products Corp.*, 415 F.2d 1058, 1064 (9th Cir. 1969).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Director is affirmed.

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1975

EASEMENT RESERVATIONS IN CONVEYANCES TO ALASKA NATIVE CORPORATIONS UNDER ANCSA

Alaska: Indian and Native Affairs—Alaska Native Claims Settlement Act: Easements

Prior to the conveyance of any land pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. § 1601 *et seq.* (1970)) (ANCSA) the Secretary must make a determination of which public easements are necessary and the Secretary must reserve those easements in the conveyance.

The Secretary has authority to reserve public easements in conveyances under ANCSA (43 U.S.C. § 1601 (1970)), other than those easements identified and recommended by the Joint Federal State Land Use Planning Commission.

The authority of the Secretary to reserve easements in conveyances under ANCSA is not limited to those public easements specifically listed in section 17(b)(1), 85 Stat. 708 of that Act.

The Secretary is not limited to reservation of easements in conveyances under ANCSA which cross the patented lands from one boundary to another. The easements may be for uses within the patented lands.

July 8, 1975

M-36880

OPINION BY DEPUTY SOLICITOR LINDGREN

OFFICE OF THE SOLICITOR

May 23, 1975

TO: THE SECRETARY

FROM: SOLICITOR

SUBJECT: EASEMENT RESERVATIONS IN CONVEYANCES TO ALASKA NATIVE CORPORATIONS UNDER THE ALASKA NATIVE CLAIMS SETTLEMENT ACT, DECEMBER 18, 1971 (85 STAT. 688—43 U.S.C. § 1601 *ET SEQ.* (SUPP. III, 1970 ED.)) ANCSA.

You have asked for a brief and concise description of the authority of the Secretary to reserve easements under section 17(b)(3) of ANCSA. Since section 17(b)(3) is not the sole source of authority for the Secretary to reserve easements, the scope of that authority must be discussed in the context of his total authority. Section 17(b)(1) of ANCSA provides:

(1) The Planning Commission shall identify public easements across lands selected by Village Corporations and the Regional Corporations and at periodic points along the courses of major waterways which are reasonably necessary to guarantee international treaty obligations, a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall receive and review statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided*, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not

operate in any way to diminish or limit such right of access.

(3) Prior to granting any patent under this Act to the Village Corporation and Regional Corporations, the Secretary shall consult with the State and the Planning Commission and shall reserve such public easements as he determines are necessary.

The inclusion of this section in the Act by the Conference Committee was the result of long and continuing expressions of need by many diverse interests during the consideration of a Native claim settlement. H.R. 10367, 92d Cong., 1st Sess. (1971), as passed by the House, contained no reference to easement reservations after the efforts to include a land use planning section were defeated. On the other hand, S. 35, 92d Cong., 1st Sess. (1971), as it passed the Senate, did contain a land use planning section in which the findings of the Land Use Planning Commission were mandatory and binding on the Secretary. Section 24 (d) of that bill provided:

(1) As a part of the Planning Commission's review of land selections by the State, by Native Villages or by corporations pursuant to section 24(a)(9) the Planning Commission shall identify public easements across such lands and at periodic points along the courses of major waterways which are reasonably necessary to guarantee a full right of public use and access for recreation, hunting, transportation, utilities, docks and such other public uses as the Planning Commission determines to be important.

(2) In identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall solicit and receive statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements: *Provided*, That any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

(3) Prior to granting any patent under this Act the Secretary shall consult with the Planning Commission and shall reserve such public easements as the Planning Commission has identified and recommends. The responsibilities granted to the Planning Commission under this section shall be transferred to the Secretary upon termination of the Planning Commission.

The Senate Committee explained the intent of that section as follows:

[A] major problem facing the State of Alaska and the Federal Government in connection with the settlement of the land claims issue and the gradual lifting of the administrative and Secretarial Order "land freeze" that has operated in Alaska over the past five years is to develop a rational and coherent land use planning capability which will operate to preserve the environment and protect the public interest in the Federal lands in Alaska without, at the same time, frustrating the reasonable expectations of the Native people and the State to exercise in a rational manner of the rights granted to them by this Act and by the Alaska Statehood Act.

* * * * *

This year, building upon the experience gained from two intensive years of consideration and many hearings on legislation to establish a National Land Use Policy, it is the Committee's view that additional actions should be taken to insure that the land resources base of Alaska is properly planned for and managed.

To achieve this goal the Committee has adopted Section 24. Section 24 provides for the establishment of a Joint Federal-State Land Use Planning Commission; the creation of a North Slope Recreation

and Transportation Corridor; and the reservation of appropriate public easements. These provisions are discussed in detail elsewhere in this report.

S. Rep. No. 92–405, 92d Cong., 1st Sess., 84–85 (1971).

The Committee then stated, by way of detailed discussion:

Section 24(d)—This section details the requirement that appropriate public easements shall be reserved under all grants and patents to insure the full rights of public use and access.

Section 24(d)(1)—This subsection directs that as a part of the Planning Commission's review of land selections by the State, by Native Villages or by corporations pursuant to section 24(a)(9) the Planning Commission shall identify public easements across such lands and at periodic points along the courses of major waterways which are reasonably necessary to guarantee a full right of public use and access for recreation, hunting, transportation, utilities, docks, and such other public uses as the Planning Commission determines to be important.

Section 24(d)(2)—This subsection directs that in identifying public easements the Planning Commission shall consult with appropriate State and Federal agencies, shall review proposed transportation plans, and shall solicit and receive statements and recommendations from interested organizations and individuals on the need for and proposed location of public easements. Any valid existing right recognized by this Act shall, however, continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access.

Section 24(d)(3)—This subsection directs that prior to granting any patent under this Act the Secretary shall consult with the Planning Commission and shall reserve such public easements as the Planning Commission has identified and recommends. The responsibilities granted to the Planning Commission under this section shall be transferred to the Secretary upon termination of the Planning Commission.

Id. at 172.

The mandatory nature of the language concerning the determinations of the Land Use Planning Commission was vigorously opposed by the House members of the Conference Committee and by the Executive Branch. Thus, the entire function of the Land Use Planning Commission became *advisory* to the Secretary [1] in the bill prepared by the Conference Committee, while the Secretary's authority was broadened to look beyond the Planning Commission and to make individual determinations on questions concerning easements. Section 17(b) of the Alaska Native Claims Settlement Act as finally enacted can be outlined as follows: The Planning Commission is directed to identify public easements for a number of public uses and access functions which it deems to be important. In the process of doing so the Planning Commission is to consult with appropriate State and Federal agencies and interested organizations and individuals. The Secretary of the Interior is then instructed, prior to granting of any patent under the Act to village and regional corporations, to consult *with the State and with the Planning Commission*, and then mandated to reserve such

[1] The Conference Report states: "The Planning Commission has no regulatory or enforcement functions, but has important *advisory* responsibilities." S. Conf. Rep. No. 92–581, 92d Cong., 1st Sess. 36 (1971) (Italics added).

public easements as he determines are necessary. It is important the Secretary *must* reserve those public easements which "*he determines are necessary.*" Thus, the Secretary must first make his own determination, in consultation with the State and the Planning Commission, as well as others, as to which public easements are *necessary* and *should be reserved* under the Act. The Act's language "the Secretary * * * shall reserve" (Section 17(b)(3)) *mandates* the reservation of those easements.

It is noted that in the original Senate version the Planning Commission dictated which easements were to be reserved, but in the final version of the Act the Secretary of the Interior makes this determination, and he is to make that determination after consultation with the State as well as the Planning Commission. Furthermore, section 17(b)(2) requires "that any valid existing right recognized by this Act shall continue to have whatever right of access as is now provided for under existing law and this subsection shall not operate in any way to diminish or limit such right of access." Therefore, in construing the meaning of "public easement," the Secretary must construe his functions under section 17(b) in such a manner as not to reduce the right of access of anyone holding any valid existing right at the time of conveyance. Thus, the Secretary's discretionary authority to reserve public easement, beyond those identified and recommended by the Planning Commission, derives from the Secretary's independent mandate to consult with the State, as well as the Planning Commission, and to ensure that "valid existing rights" of access are preserved.

It has been argued that the purposes for which easements may be reserved and the circumstances in which they may be reserved listed in section 17(b)(1) are limitations upon the authority of the Secretary in section 17(b)(3). This construction of the statute will not hold up under close examination because: (1) the Act requires the Secretary to look beyond the Planning Commission for consultation before making his determinations; (2) the Secretary is directed not to reduce the right of access of any valid existing right; (3) the language of section 17(b)(1) is *ejusdem generis* in nature and is not that ordinarily used when the doctrine of *expressio unius est exclusio alterius* is intended to apply. The first two reasons have been examined in some detail already in this opinion. With respect to (3) above, section 17(b)(1) ends with the phrase "and such *other public uses* as the Planning Commission determines to be important." (Italics added.) This phrase makes it clear that the use or access functions listed previously in that subsection are not exclusive. The reemphasis of the term "public use" in that phrase would also indicate a relation back to such "public use" needs as arise in the fulfillment of international treaty obligations.

Relevant parts of the Conference Report also indicate that the nature and purposes of easements to be reserved were to be determined chiefly in light of the duty of the Planning Commission and the Secretary to protect the "larger public interest":

> Appropriate public access and recreational site easements will be reserved on lands granted to Native Corporations to insure that the *larger public interest* is protected. S. Conf. Rep., *supra*, at note 1. (Italics added.)

An explanation of the term "public use" as used in section 17(b)(1) is appropriate. A "public use" has been defined as that which, (1) enables "the United States or a State * * * to carry on its governmental functions, and to preserve the safety, health, and comfort of the public * * * (2) to serve the public with some necessity or convenience of life * * * (3) in certain * * * cases * * * to enable individuals to carry on business * * * if their success will indirectly enhance the public welfare." *Delfeld v. City of Tulsa*, 131 P. 2d 754, 757–9, 191 Okla. 541 (1942). The weight of authority is to the effect that "public use" encompasses the concept of public advantage. Thus, the United States Supreme Court has said, "Public uses are not limited, in the modern view, to matters of mere business necessity and ordinary convenience, but may extend to matters of public health, recreation and enjoyment." *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707 (1923). Public uses, then, obviously involve more than simply access-related functions.

The use of the terms "recreation sites" and "camp sites" throughout the Conference Report clearly indicates that Congress contemplated that the Secretary would have the authority to reserve site easements for public uses on lands conveyed to village and regional corporations.[2]

In various oral and written comments to the Department, much emphasis is placed on the term "across" in the phrase in section 17(b)(1), "identify public easements across lands selected." The term "across" has been construed by the courts over the years to have a very broad meaning that is not limited to a line from one boundary to another boundary of a piece of property. It has been variously held to mean, "Over" *Commonwealth, ex rel Tel. Co. v. Warwick, Mayor et al.*, 40 A. 93, 185 Pa. 623 (1898); *Illinois Central R. Co. v. City of Chicago*, 30 N.E. 1044, 141 Ill. 586 (1892); *State v. Newport St. Ry. Co.*, 18 A.

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[2] "Appropriate public access and recreational site easements will be reserved on lands granted to Native Corporations to insure that the larger public interest is protected." *Id.*

"Section 17 of the conference report is based upon section 24 of the Senate amendment.

2. Subsection 17(b) of the Conference Report is substantially the same as section 24 (d) of the Senate amendment. This subsection provides for the advance reservation of easements and camping and recreation sites necessary for public access across* lands granted to Village and Regional Corporations." *Id.*, at 44.

*We have some difficulty in conceptualizing a recreation site on Native lands necessary for access across Native lands.

161, 16 R.I. 533 (1889); *Brown v. Meady*, 25 American Decision 288, 10 Me. 391 (1833); "Along" *Mt. Vernon Telephone Co. v. Franklin Farmers Co-op Tel. Co.* 92 A. 934 (Me. 1915); *Brooklyn Heights R.R. Co. v. Steers, et al.* 106 N.E. 919, 213 N.Y. 76 (1914); "On" "The reservation of the right to maintain a drain 'across' the land conveyed is not nullified because the drain, in fact, ended in a cesspool 'on' the land conveyed." *Jones v. Adams, et al.* 38 N.E. 437, 162 Mass. 224 (1894); "Upon" (same citations as "along"); "Through" and "Within" *Quanah, A. & P. Ry. Co. v. Cooper*, 236 S.W. 811 (Tex. 1922). In view of the two conclusions that section 17(b)(1) is not a limitation on the Secretary and that "across" has a very broad meaning, it is concluded that the term "across", standing alone, does not prescribe the place or manner in which a public easement may be reserved.

It has been argued that the "across" language followed by the language "and at periodic points along the course of major waterways" further delimits the Secretary's authority to proscribe him from reserving linear easements along the course of any major waterway. At least three responses can be made to that argument. First, linear easements along the course of a major waterway might be necessary, in the opinion of the Secretary, to fulfill some public easement function such as the guaranteeing of international treaty obligations or some access functions such as rights-of-way for transportation or utilities. Second, such linear easements will, in appropriate circumstances, qualify as being "across" selected lands. Finally, after consultation with the State of Alaska, the Secretary may determine that such a linear easement is reasonably necessary. As a result of these possible situations and in view of obvious Congressional intent to preserve valid existing rights and to protect the larger public interest, such a narrow and constricted interpretation as that proposed in various oral and written comments submitted to the Department cannot be placed upon the statute.

Each statute already in force and applicable to Alaska, authorizing the reservation of easements, has not been examined in light of Section 26 of the ANCSA. Each of these statutes must be examined with care to determine whether they should be used in conjunction with section 17(b), in lieu of section 17(b), or must be construed as repealed. However, in examining these alternatives it must be remembered that there is a strong presumption against implied repeal. *Federal Trade Commission v. APW Paper Co., Inc.*, 328 U.S. 193 (1946); *U.S. Alkali Export Assn. v. U.S.*, 325 U.S. 196 (1945); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945).

There are four limitations upon the Secretary in carrying out his obligations under section 17(b). The first is contained in section 17(b)(2) which prohibits the reduction of the right of access for anyone holding a valid existing right under present law. The second limitation appears

in section 17(b)(3) and requires that he first determine public easements are necessary before any reservation is made. Third, the easement reserved must be a public easement or an easement to fulfill the obligation of section 17(b)(2).

Fourth, the easement should be a public use or an access-related easement. This fourth conclusion is not clearly spelled out in section 17(b)(2) or (3) but is strongly suggested by the general scope of section 17(b)(1).

Despite these limitations on the authority of the Secertary, he is vested with broad authority by section 17(b)(3) and with certain obligations. In the exercise of his authority he must be reasonable and not arbitrary or capricious in his determinations of what easements are necessary or not necessary. A determination that an easement is necessary or not necessary should be recorded and accompanied by a written record in support thereof in case the determination is challenged. (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); *Camp v. Pitts*, 411 U.S. 138 (1973)). The exercise of the Secretary's authority is, in part, a policy function of his office and the exercise of that authority is not totally dictated by this statute but also by general principles of law.

DAVID E. LINDGREN,
Deputy Solicitor.

ADMINISTRATIVE APPEAL OF SESSIONS, INC. (A CALIFORNIA CORPORATION) v. RICHARD AMADO MIGUEL (LESSOR) LEASE NO. PSL-35

4 IBIA 84

Decided *July 10, 1975*

Appeal from an administrative decision canceling a long-term business lease.

Affirmed.

1. Indian Lands: Leases and Permits: Long-term Business: Rentals—Indian Lands; Leases and Permits: Long-term Business: Waiver: Generally

Acceptance of rentals by a lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of items in default in the absence of showing that lessor voluntarily or intentionally waived the requirements under the lease.

2. Indian Lands: Leases and Permits: Long-term Business: Cancellation

A lease may be canceled by the Secretary, at the request of the lessor where lessee has failed to carry out specific provisions of the lease.

APPEARANCES: Dillon, Boyd, Dougherty and Perrier, a Professional Corporation, for appellant, Sessions, Inc., a California Corporation; William M. Wirtz, staff attorney, Sacramento Regional Solicitor's Office for Richard Amado Miguel, appellee.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before this Board on an appeal timely filed by Sessions, Inc., hereinafter referred to as appellant, from a decision of the Area Director, Sacramento Area Office, Bureau of Indian Affairs, canceling a business lease.

The appeal involves cancellation of Lease No. PSL–35, Contract No. 14–20–0550–804, hereinafter referred to as lease, on trust allotted lands acquired by appellant's predecessor in interest, Rancho Trailer Park, Inc., on April 11, 1960, from the Indian owner, Richard Amado Miguel, hereinafter referred to as appellee.

The lease covers a five-acre tract described as S½NE¼, NE¼, SE¼, section 22, T. 4 S., R. 4 E., San Bernardino Base Meridian, Riverside County, California, being a portion of the trust allotment of the appellee, PS–8.

This lease, being one of seven leases approved on January 27, 1961, by the Secretary of the Interior to the appellant's predecessor in interest, can be characterized as a unitized lease since all seven leases contain identical covenants and differ only as to the rent, description of the land, lessors, and the cost of improvements for each individual parcel of land.

According to the record, the Area Director on July 30, 1974, gave the appellant 60 days in which to cure the default in performance of Articles 7, 8 and 11 of the lease. The appellant failed to cure said defaults and on October 15, 1974, the appellant was notified of the cancellation of the lease effective as of that date for the following reasons:

Failure to complete construction of three hundred thousand dollars ($300,000) worth of improvements on the leased premises and failure to submit a general plan and architect's design for development of said premises.

The Articles of the lease in dispute, 7, 8 and 11, in pertinent part provide:

7. IMPROVEMENTS

As a material part of the consideration for this lease, the lessee covenants and agrees no less than five (5) years after the beginning date of the term of this lease, lessee will have completed construction of permanent improvements on the leased premises at a cost of and having a reasonable value of THREE HUNDRED THOUSAND DOLLARS ($300,000).

8. GENERAL PLAN AND DESIGN

Within two (2) years after the approval of this lease, the lessee shall cause to be prepared and submitted to the Secretary for approval, a general plan and architect's design for the full improvement and complete development of the entire leased premises. The Secretary shall not unreasonably withhold approval and shall either approve or state his reasons for disapproval within thirty (30) days

after said plans are presented to him by the lessee.

11. COMPLETION OF DEVELOPMENT

It is understood and agreed that the lessee will complete the full improvement and development of the leased premises in accordance with the general plan and architect's design, submitted in accordance with Article 8, above, within five (5) years from the beginning date of the term of the lease.

The appellant from the said cancellation filed a timely appeal to the Commisioner, Bureau of Indian Affairs, who in turn on December 4, 1974, referred the matter to this Board for disposition. In support of the appeal the appellant contends as follows:

1. Sessions Inc. submitted plans and designs for the improvement of the leased premises that have neither been approved nor disapproved by the Secretary and his subordinates.

2. Sessions' obligation to redevelop Lease PSL–35 is excused by the refusal of one or more of the Indian Lessors to approve plans and designs for the redeveopment [sic] of Rancho Trailer Park and grant the dedications of city streets required for the development.

3. The Secretary and the Lessor, by having accepted the rent called for under Lease No. PSL–35, have waived Sessions' obligations under the lease to complete the development of the leased premises.

4. It would be an unjust result to forfeit lease PSL–35.

In brief, the lease in question required the appellant to fully develop and improve within five years from January 27, 1961, the leased premises which were then used as a trailer park. To this end, the lease terms provided that appellant was to submit within two years from January 27, 1961, to the Bureau of Indian Affairs as representative of the Secretary of the Interior for approval, a general plan and architect's design for permanent improvements. The plan, if approved, required construction of improvements to be completed by January 26, 1966.

Considering the Bureau of Indian Affairs' reasons for canceling the lease and appellant's contention opposing the cancellation, it is quite apparent that nonperformance of Articles 7, 8 and 11 is claimed by the appellee while appellant claims waiver of performance.

It is the contention of appellant that it is not in default of its obligations under Article 8 because the Secretary and his subordinates did not take any action on the alleged plans submitted by appellant to the Bureau of Indian Affairs and appellee as required by Article 8 of the lease. The appellant, accordingly, attributes its noncompliance under Article 11 of the lease on the Secretary's failure to act on the alleged plans submitted on March 20, 1966. The alleged plans, among other things, required that the appellee dedicate part of his land to the city of Palm Springs for widening and extending a certain street through the middle of the leased premises.

The Board finds nothing in the lease requiring dedication as a requirement of the development of the property. Since the dedication would require a substantial amendment to the lease, the Bureau of Indian Affairs was not required to approve or disapprove the alleged plan since it was not one to commercially develop the property within the terms of the lease. Refusal by the appellee to dedicate his land can hardly be labeled as arbitrary or unreasonable in view of the fact that dedication could possibly destroy for all time the future use of the property for commercial purposes.

Moreover, in the absence of an approved extension, although requests had been made, of the period for submission of the plan and architect's design under Article 8 of the lease, the Board finds that appellant was in default thereof as of January 26, 1963.

Additionally, in the absence of an approved extension and the failure of appellant to complete the improvements under Articles 7 and 11 by January 26, 1966, the Board further finds that appellant was in default as to these Articles.

Appellant's contention that performance of the obligation imposed by Articles 7, 8 and 11 was waived by appellee's continued acceptance of the rentals without requiring performance of the obligations or instituting actions determining the lease is unacceptable.

[1] The Board in the *Administrative Appeal of Sessions, Inc.* v. *Vyola Olinger Ortner, et al.*, 3 IBIA 145, 81 I.D. 651 (1974), held that acceptance of rentals by the lessor subsequent to default on specific provisions of the lease by the lessee does not constitute waiver of items in default in the absence of showing that lessor voluntarily or intentionally waived the requirements under the lease. The Board in support of its position cited the cases of *Sessions, Inc.* v. *Morton, et al.*, 348 F. Supp. 694 (C.D. Cal. 1972), affirmed in *Sessions, Inc.* v. *Morton, et al.*, 491 F. 2d 854 (9th Cir. 1974). The court in the foregoing cases under very similar and like circumstances as in the case at bar found that acceptance of rentals by the lessor did not effect or constitute waiver of default. The lease under consideration by the court, like the lease on appeal herein, was one of the original group of seven Indian leases on the Palm Springs Indian reservation.

[2] Moreover, the Board in the above-cited *Administrative Appeal of Sessions, Inc., supra*, held that a lease may be canceled by the Secretary at the request of the lessor where lessee has failed to carry out specific provisions of the lease.

In view of the reasons hereinabove stated, the Board finds the Area Director's decision of October 15, 1974, canceling appellant's lease was fully justified and his decision should be affirmed.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), *as amended*, June 12, 1975,

the decision of the Area Director dated October 15, 1974, canceling Lease PSL-35, Contract No. 14-20-0550-804, be, and the same is hereby AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

APPEAL OF WHALEN & COMPANY

IBCA-1034-5-74

Decided *July 18, 1975*

Contract No. 14-06-600-733A, Specifications No. 604C-95, East Bench Unit, Montana, Bureau of Reclamation.

Sustained.

1. Contracts: Construction and Operation: Construction Against Drafter—Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Duty to Inquire

The Board sustains the contractor's claim that it be paid for gravel representing the area of the pipe within the pay lines, holding that in the particular circumstances the contractor's interpretation that the pay line quantity was merely nominal or hypothetical was reasonable and rejecting the Government's contention that the difference between the estimated quantity and the pay quantity under appellant's interpretation should have prompted appellant to inquire of the contracting officer.

APPEARANCES: Mr. Bruce R. Toole, Attorney at Law, Crowley, Kilbourne, Haughey, Hanson & Gallagher,, Billings, Montana, for the appellant; Mr. Leonard B. Desmul, Department Counsel, Billings, Montana, for the Government.

OPINION BY ADMINISTRATIVE JUDGE NISSEN

INTERIOR BOARD OF CONTRACT APPEALS

This appeal involves a dispute as to whether the volume of pipe was properly deducted from the pay quantity of filter gravel placed around pipe in a drainline.

Findings of Fact

The contract awarded on September 14, 1973, was in the estimated amount of $107,739.10 and called for the furnishing and laying of approximately 2.63 miles of 6-through 21-inch drain pipe, the construction of approximately 450 feet of open drain, construction of 12 manholes and outlet structures and connecting one pipe drain to one existing manhole. Work was accepted as substantially complete on January 23, 1974, and timeliness of completion is not in issue.

Appellant excepted three claims from the release of claims executed on February 8, 1974: $4,000 retained for cleanup, $4,019.12 for differing site conditions and $6,017.50 as an underpayment on schedule Item 6.

Only the latter claim is presently before us.

Item 6 is described in the schedule as follows:

> Furnishing and placing gravel backfill in pipe drain trenches

The estimated quantity was 1,020 cubic yards.

Section 2.2.8 of the specifications, entitled "Gravel Backfill in Pipe Trenches," provides in part:

> Uncompacted gravel backfill for an envelope and filter shall be placed around all drain pipe that is laid with open joints for the pipe drains as shown on the drawings. * * *
>
> * * * * * *
>
> Measurement for payment for gravel backfill and stone packing as provided in subparagraph *b* of Paragraph 2.2.5, will be made within the pay lines and to the depths as shown on the drawings, specified on the profiles, or as directed by the contracting officer. Payment for gravel backfill and stone packing will be at the unit price per cubic yard bid in the schedule for furnishing and placing gravel backfill in pipe drain trenches, which shall include the excavating, processing, loading, hauling and placing the gravel.

Sections and details of pipe drains are shown on Drawing X–604–106. The drawing shows pay lines for trench excavation varying from two feet in width for 6-inch pipe to 3 feet 3 inches for 21-inch pipe. Paylines for gravel backfill are shown as a rectangular area in the trench extending four inches from all points on the perimeter of the pipe. Neither the specifications nor the drawings expressly provide for deducting the volume of the pipe from the quantity of gravel placed in determining pay quantities.

Appellant explained the basis for its claim in a letter to the Bureau, dated February 13, 1974, which quoted from Section 2.2.8 of the specifications, cited the pay lines shown on Drawing X–604–106 and stated in part:

> * * * * * *
>
> (3) As I am sure you are aware, much more gravel is required to construct the gravel envelope than is paid for; gravel will not stand on a vertical slope 4 inches each side of the pipe as indicated on the drawings. Consequently, the quantity measured for payment is nothing other than a hypothetical quantity determined by measurement of the quantity contained within the pay lines set forth in contract documents.
>
> (4) In preparing our original estimate of the cost of doing the work, to be performed under Bid Item No. 6, we figured the quantity of gravel actually required to construct a unit of the gravel envelopes, and the quantity we would receive payment for if payment was made for the area within the pay lines set forth on the drawings without deductions. Thus a unit cost for gravel backfill to be measured for payment was arrived at.
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> * * * * * *

Appellant asserted that the volume of gravel within the pay lines shown on the drawings without deductions was 1,324 cubic yards, that the Bureau allowed payment for only 909 cubic yards and that it was entitled to payment for the difference of 415 cubic yards at the contract price of $14.50 per cubic yard or $6,017.50. The amount of filter gravel actually placed was allegedly in excess of 1,850 cubic yards.

The contracting officer determined that appellant's interpreta-

tion overlooked the crucial words in Section 2.2.8 of the specifications that "measurement for payment * * * will be made within the pay lines *and to the depths* as shown on the drawings, * * *." (Italics supplied.) He found that the deletion of the words "and to the depths" would support appellant's interpretation. Accordingly, in a Findings and Decision, dated March 29, 1974, he denied the claim.

Mr. Whalen further explained his understanding of the specifications and the manner of computing his bid at a hearing in Billings, Montana, on April 21, 1975. He testified that it was not possible to excavate the trench to the vertical pay lines shown on the drawing and that depending upon the material encountered the top of the trench might vary from a minimum of four to six feet in width under ideal conditions to over 45 feet under the worst conditions (Tr. 9, 10, 12). Similarly, with respect to the envelope of filter gravel placed around the pipe, he asserted that the envelope when completed did not resemble the vertical pay lines shown on the drawing and that it was necessary to place two yards of gravel in order to be paid for one (Tr. 12–14, 22). He therefore concluded that the pay lines shown on the drawing were merely nominal.

In Mr. Whalen's own words: "* * * I don't know whether I'm right or whether I'm wrong, but I interpret that thing is that the pay quantities in excavation and the pay quantities in that gravel is (sic) nothing more than nominal because I think anybody that has dug a trench out in ground like there is at Dillon knows you're not going to dig a trench like that. * * * I'm not saying that I'm right or wrong but when you start making deductions on that then I think you're trying to make it real when its not real in the first place and I didn't interpret it as being real and I may be wrong * * *." (Tr. 20, 21.)

Mr. Whalen testified that in determining actual quantities of filter gravel required he deducted the volume of the pipe, but in determining the quantities for which payment would be made he made no deduction for the volume of the pipe (Tr. 24, 26, 27). This is illustrated by a free-hand sketch (App's. Exh. A) drawn by Mr. Whalen wherein actual quantities are shown in the form of a trapezoid with side slopes of 1¼ to 1½ to 1 representing the natural slope of the gravel, while the vertical pay line quantities are labeled theoretical.

According to Mr. Whalen, gravel delivered to the site cost roughly six dollars a cubic yard, resulting in 12 dollars in out of pocket costs, exclusive of overhead and other expenses, for each cubic yard for which the contractor was to be paid (Tr. 18). It is not clear whether this figure includes wastage and the cost of placing the gravel around the pipe. Appellant's bid price of $14.50 per cubic yard is to be compared with the engineer's estimate of $9.50.

Mr. Sam Moss, authorized representative of the contracting officer at

the time of the award and performance of the contract, testified that to his knowledge no bidder asked for clarification of the specifications concerning measurement for payment of filter gravel (Tr. 58). He asserted that although the gravel envelope was among items discussed at the preconstruction meeting on September 25, 1973, Mr. Whalen did not ask any questions or complain of the ambiguous nature of the specifications in this regard (Tr. 36). Although Mr. Moss had been involved in the administration of numerous drainage contracts with similar or identical provisions, this was the first time, to his knowledge, that the Bureau's method of determining pay quantities for the gravel envelope had ever been questioned.[1]

Mr. Moss further testified that the estimated quantity of 1,020 cubic yards for Item 6 shown in the bidding schedule was the quantity within the pay lines (Tr. 60). He stated that the Bureau had always assumed that a contractor would use approximately twice the amount of gravel it would be paid for (Tr. 48), thus confirming the reasonableness of appellant's assumptions in this regard. The engineer's estimate of $9.50 per cubic yard for Item 6 was based on this assumption (Tr. 61). He indicated that some contractors had attempted to use forms to reduce gravel usage to approximately the quantity paid for, but that time spent in moving and placing forms made it much more expensive, with the consequence that almost all contractors elected to use excess gravel (Tr. 48). He was of the opinion that the 25 or 30 percent increase in volume of gravel over the engineer's estimate under appellant's interpretation of the specifications should have been sufficient to prompt appellant to seek clarification from the Bureau (Tr. 58).

The plan and profile for Drain 13–5–7 (Drawing 699–604–906) contains the statement: "Extend gravel envelope to top of Hv Cl. [heavy clay] strata as directed." In rebuttal testimony, Mr. Whalen stated that he interpreted the phrase "and to the depths" contained in Section 2.2.8 of the specifications as applicable to a situation where the contractor had been directed to extend the gravel envelope more than four inches from the perimeter of the pipe (Tr. 70, 71). He further stated that he had not checked the esti-

[1] Tr. 35, 40–42, 58. An affidavit of a Bureau engineer, Mr. Frank P. Dakan, dated September 18, 1974, to which was attached a list of 15 contracts, including the instant one, performed since May of 1962, in the Crow Creek, Helena Valley and East Bench Units in Montana and a list of 20 contracts performed in the Riverton and Hanover Bluff areas in Wyoming since June 1958, is to the effect that all of the listed contracts have contained the phrase "within the paylines and to the depths" in the specifications and drawings similar to the one here involved describing the gravel envelope and that none of these contractors, save Whalen & Company, have interpreted the quoted phrase as including the volume of the pipe within pay lines for gravel. While we have permitted the introduction of opinion testimony and of specifications under other contracts as relevant to the reasonableness of interpretation of allegedly ambiguous contract provisions (*Allison & Haney, Inc.*, IBCA–587–9–66, 76 I.D. 141 (1969), 69–2 par. 7807 at 36,262–264), Mr. Dakan did not appear as a witness at the hearing and we accept the affidavit only as evidence that no other listed contractor disputed the Bureau's method of determining pay quantities for filter gravel.

mated quantity because the Bureau accepted no responsibility for the accuracy of its estimates and reserved the right to eliminate a bid item from the award (Tr. 74, 75).

Decision

Appellant argues that the contract language clearly favors Mr. Whalen's interpretation but that if the provision in question be regarded as ambiguous, then application of the rule that ambiguities will be construed against the drafter requires a holding in its favor. Predictably, the Government denies that the contract is ambiguous. Citing the alleged fact (note 1) that drainage contracts since 1958 have contained identical language and similar drawings of the gravel envelope and that no other contractor has interpreted the payment provision for gravel as including the volume of the pipe, it argues that the provision in question is not fairly susceptible of the construction advocated by appellant. It also asserts that, in any event, appellant's failure to seek confirmation of its interpretation prior to award precludes recovery.

It is clear that neither the contract nor the applicable drawing expressly provide for deduction of the volume of the pipe from pay line quantities of filter gravel. It is also clear that except where forms are used (which are so expensive as to be impractical) filter gravel within the pay lines is not realistically related to the actual quantity of gravel required to place the envelope in accordance with the drawing, being as little as one-half or less of the actual quantity. Accordingly, we find appellant's conclusion that pay line quantities of filter gravel were merely nominal or hypothetical to be sufficiently reasonable as to preclude acceptance of the contention that the only permissible interpretation is that adopted by the contracting officer.[2] We, therefore, conclude that the provision in issue is ambiguous.

Our study of the language in Section 2.2.8 of the specifications that "Measurement for payment for gravel backfill * * * will be made within the paylines and to the depths as shown on the drawings, specified on the profiles, or as directed by the contracting officer" convinces us that the preferable interpretation is that adopted by the contracting officer, since appellant's view would be fully supportable absent the phrase "and to the depths." However, the issue, once an ambiguity is found, is not whether appellant's interpretation is correct but whether it is reasonable.[3] We conclude that appellant's interpretation of the phrase "and to the depths" as possibly applicable

[2] Before the rule that ambiguities will be construed against the Government as the drafter may be applied, it is necessary to find that the contractor's interpretation was reasonable, *Gentz Construction Company*, IBCA–1015–1–74 (December 26, 1974), 81 I.D. 758, 75–1 BCA par. 11,010 and cases cited.

[3] *Crescent Communications Corp.*, DOT CAB No. 73–12 (March 15, 1974), 74–1 BCA par. 10,531. See also *T.G.C. Contracting Corporation*, ASBCA No. 19116 (June 18, 1975), 75–2 BCA par. 11,346.

to a situation where the contractor had been directed to extend the gravel envelope more than four inches from the perimeter of the pipe in accordance with the note on Drawing 699–604–906, while perhaps not the preferred interpretation, precludes rejection of appellant's position on the theory that his interpretation does not give effect to all parts of the contract.

[1] A prospective contractor is required to bring to the Government's attention only major patent discrepancies or obvious conflicts or omissions and is not required to seek clarification of all doubts, ambiguities or possible conflicts in interpretation.[4] From what we have said above, we think it clear and have no hesitancy in finding that the ambiguity in the proviso in question was not so obvious as to require appellant to seek clarification prior to bidding. The Government asserts that appellant is seeking an increase in excess of 45 percent in the pay quantity of filter gravel (415 divided by 909) and that comparison of the estimated quantity with the pay quantity under appellant's interpretation should have alerted appellant to a major discrepancy. We note that the proper comparison is between the estimated quantity of 1,020 cubic yards and the increase of 304 caused by including the volume of the pipe within the pay quantity, which results in an increase of approximately 30 percent. While we have held that a gross discrepancy between the estimated quantities and the pay quantities under the prospective contractor's interpretation may well be sufficient to invoke the duty to inquire,[5] we consider that some variation between estimated and actual quantities is normal and hold that the threshold requiring appellant to seek clarification has not been crossed here.[6]

The record is clear and we find that appellant relied on its interpretation in preparing and submitting his bid. While we assume that the volume of gravel occupied by the area of the pipe is readily determinable, the contracting officer has not addressed the issue of quantum and under the circumstances we remand the matter to the contracting officer for determination of the amount due.[7]

Conclusion

The appeal is sustained.

SPENCER T. NISSEN,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

[4] *Gentz Construction Company*, note 2, *supra.*

[5] *Power City Electric, Inc.*, IBCA–950–1–72, 80 I.D. 753 (1973), 74–1 BCA par. 10,376 (estimated quantity of 400 stations versus claimed quantity of 1,282.6 stations).

[6] We think the Government's contention requires more sophistication than can reasonably be required of small business concerns for which this project was set aside. *Cf. Gorn Corporation* v. *United States*, 191 Ct. Cl. 560 (1970).

[7] *Power City Electric, Inc.*, note 5, *supra.*

ESTATE OF MILWARD WALLACE WARD

4 IBIA 97

Decided *July 18, 1975*

Appeal from an order denying petition for rehearing.

Affirmed.

1. Indian Probate: Children, Adopted: Indian Custom Adoptions—155.4

An Indian custom adoption, alleged to have been made prior to the date of the Act of July 8, 1940 (54 Stat. 746, 25 U.S.C. § 372a), cannot be recognized as valid unless the adoption is recorded, as provided in the Act, during the lifetime of the adoptive parents.

2. Indian Probate: Rehearing: Generally—370.0

An order denying a rehearing is proper when the pettiion for rehearing alleging newly discovered evidence fails to state any other grounds which would require a rehearing and, accordingly, an appeal from the denial will be dismissed.

APPEARANCES: Alfred Ward, Irene Ward Wise, Elizabeth A. Collins, pro se; Christopher A. Crofts of Hamilton and Hursh, a professional corporation, for Ina D. Witt, Walter Thompson, Charles G. Thayer, Jerry K. Thayer, Ingrid G. Teuscher and Mike Witt.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before this Board on an appeal filed by Alfred Ward, Irene Ward Wise, and Elizabeth A. Collins, hereinafter referred to as appellants, from an order denying petition for rehearing, issued by Administrative Law Judge William E. Hammett, on November 21, 1974.

In their petition for rehearing the appellants in essence alleged error on the part of the Administrative Law Judge in not finding that Milward Wallace Ward, hereinafter referred to as decedent, was adopted by Delbert Ward, Sr., and Susan L. Ward, according to Shoshone Indian custom and as a result thereof, the appellees rather than the appellants were found to be the decedent's heirs at law.

The Judge in denying the petition found that the appellants had failed to meet the requirements of 43 CFR 4.241(a) which in relevant part provides:

> * * * If the petition for rehearing is based upon newly-discovered evidence, it shall be accompanied by affidavits of witnesses stating fully what the new testimony is to be. It shall also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. * * *

The Judge further found that no additional evidence had been presented which would effectively controvert the basis for the initial decision of September 11, 1974.

The basis for the original decision of which the appellants complain was that the evidence presented at the hearings held in the matter on

August 3 and August 9, 1973, failed to meet the requirements of 25 U.S.C. § 372a (1970) in establishing an adoption recognizable thereunder. Accordingly, the Judge found the decedent's heirs to be his natural mother and natural half-siblings, the appellees herein.

The record, as presently constituted, clearly indicates that the appellants failed to establish a recognizable adoption under the provisions of 25 U.S.C. § 372a (1970). The evidence presented by appellants at the hearing and in their petition for rehearing clearly fell short of establishing a recognizable adoption under section 372a, *supra*.

Recordation of an Indian custom adoption as a requirement of recognition under 25 U.S.C. § 372a (1970) for inheritance purposes has long been considered by the Department as being mandatory rather than directory.

[1] An Indian custom adoption, alleged to have been made prior to the effective date of the Act of July 8, 1940 (54 Stat. 746, 25 U.S.C. § 372a), cannot be recognized as valid unless the adoption is recorded, as provided in the Act, during the lifetime of the adoptive parents. *Estate of Mark Fish Guts*, IA–79 (April 21, 1952). Before an adoption by Indian custom made prior to July 8, 1940 shall be recognized as valid, it shall be recorded with the Superintendent of the Agency. *Estate of Jeanette Ezekial*, IA–643 (May 17, 1956).

The record further indicates that appellants failed to meet the requirements of 43 CFR 4.241(a) regarding rehearings. Appellants as justification attributed their failure to present evidence regarding the Indian custom adoption at a prior hearing on inadequate notice of the hearing and on their belief and understanding that their attorney would submit a brief on their behalf as well as a claim for care as permitted by the Judge during the hearing. The foregoing reasons are unacceptable. The record contrary to the appellants' contention shows that appellants and their counsel had ample time before, during and subsequent to the hearings to present evidence in support of their contentions regarding Indian custom adoptions. Their failure to do so should however in no manner affect the rights of the appellees.

Moreover, appellants' statement and petition for rehearing clearly show that they have no new evidence to justify a rehearing nor do they present any new legal basis for a contrary decision.

The Department has consistently held that a petition for rehearing will be denied where the petition alleges newly discovered evidence but fails to state the alleged newly discovered evidence or to state why such evidence was not presented at a prior hearing.

[2] An order denying a rehearing is proper when the petition for rehearing alleging newly discovered evidence fails to state the alleged newly discovered evidence and fails to state any other grounds which would require a rehearing, and, ac-

cordingly, an appeal from the denial will be dismissed. *Estate of Lucy Feathers (Grace Medicinebird Lefthand, Bitner, Ridgby, White Plume or Geary)*, 1 IBIA 336, 79 I.D. 693 (1972).

For the foregoing reasons, the Board finds that the Administrative Law Judge in his Order of September 11, 1974, did not err in finding that a valid adoption under 25 U.S.C. § 372a (1970) had not been established by the appellants and that the reasons set forth in their petition for rehearing did not meet the requirements of 43 CFR 4.241(a). Accordingly, the Order Denying Petition for Rehearing, dated November 21, 1974, should be affirmed.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's Order Denying Petition for Rehearing dated November 21, 1974, is hereby AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

APPEAL OF QUINTANA CONSTRUCTION CO., INC.

IBCA-1028-4-74

Decided *July 24, 1975*

Contract No. 14-06-200-7377A, Paving Stampede Dam Access Road, Washoe Project, Nevada-California, Bureau of Reclamation.

Sustained.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Estimated Quantities—Contracts: Disputes and Remedies: Equitable Adjustment—Contracts: Disputes and Remedies: Burden of Proof

The Government failed to sustain its burden of proving entitlement to a reduction of the contract price as an equitable adjustment for quantities of asphalt concrete for road repair in excess of the Government estimate. The evidence showed that neither party relied on the estimate, that the Government left the selection and manner of using equipment to the contractor and that the Government issued a change order when it observed the contractor's more efficient operation. The work described in the change order was the same work described in the contract and the reduction in unit cost of performance was not the result of the change order but was the result of the contractor's efficiency.

APPEARANCES: Mr. Thomas F. Camp, Attorney at Law, Oakland, California, for the appellant; Mr. Ernest J. Skroch, Department Counsel, Sacramento, California, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This is an appeal from the contracting officer's finding that the

Government was entitled to a reduction in the contract unit price of asphalt concrete from $60 per ton to $23.30 per ton, as an equitable adjustment for a decrease in the contractor's unit cost resulting from a change order which dealt with quantities in excess of the Government estimate.

Contract No. 14–06–200–7377A, in the estimated amount of $234,935.50, was awarded on June 8, 1973, to the Quintana Construction Co., Inc., for paving the Stampede Dam Access Road, Washoe Project, Nevada, California. The contract contained thirteen items of work or materials. We are concerned only with Item No. 3 which required that Quintana furnish and place an estimated quantity of 200 tons of asphalt concrete for road repair at a price of $60 per ton. Paragraph 18 of the special conditions provides that the estimated quantities in the schedule are for the purpose of comparison of bids and that no claim shall be made against the Government for any deviation of the actual quantities from the estimate.[1]

Paragraph 38 of the special conditions urges bidders to visit the site and to satisfy themselves as to the existing conditions affecting the work to be done and further charges them with knowledge of such conditions in the event they choose not to visit the site.[2]

The work to be performed is described generally in Paragraph 10 of the special conditions as repairing damaged areas of the road surface by cleaning out loose material and refilling with asphalt concrete before paving the existing road.[3] The Road Surface Repairs are described in more detail in Paragraph 46, which requires the contractor to perform all work for repairing the

[1] "18. *Quantities and Unit Prices*

"The quantities stated in the schedule are estimated quantities for comparison of bids, and no claim shall be made against the Government for excess or deficiency therein. Payment at the unit or lump-sum prices agreed upon will be in full for the completed work and will cover materials, supplies, transportation, labor, tools, machinery, and all expenditures incident to satisfactory compliance with the contract, unless otherwise specifically provided." (Contract, Appeal File Document No. 3.)

[2] "38. *Investigation of Site Conditions*

"Bidders are urged to visit the site of the work and by their own investigations satisfy themselves as to the existing conditions affecting the work to be done under these specifications. If the bidder chooses not to visit the site or conduct investigations he will nevertheless be charged with knowledge of conditions which reasonable inspection and investigations would have disclosed.

"Bidders are also urged to carefully examine all of the materials and information regarding site conditions made available by the Government and to obtain their own samples and perform tests on the soil and rock materials to determine unit weights, to evaluate shrinkage and swell factors, and to evaluate other properties which the bidder believes to be significant in arriving at a proper bid.

"Bidders and the contractor shall assume all responsibility for deductions and conclusions as to the difficulties in performing the work. Those desiring to visit the site of the work should contact the Project Manager, Lahontan Basin Projects Office, Federal Building, 3rd Floor, 705 North Plaza Street, P.O. Box 640, Carson City, Nevada 89701, telephone (702) 882–3436." (Contract, Appeal File Document No. 3.)

[3] "10. *Description of the Work*

"The work to be performed under these specifications consists of:

a. Repairing damaged areas of the road surface by cleaning out loose material, applying an asphalt tack coat and refilling with and compacting plant mix asphalt concrete." (Contract, Appeal File Document No. 3.)

bituminous surfacing of the road.[4] Paragraph 50 contains a description of asphalt concrete to be used and permits hand placing of patching in small areas. It further provides that measurement for payment shall be made of the number of tons placed as directed by the contracting officer and that payment will be made at the unit price per ton in schedule item 3.[5]

When approximately half of the road surface had been repaired, the estimated quantity of 200 tons of asphalt concrete for the entire project had been exceeded by more than 100 tons. The remaining road surface was in even worse condition, and required continuous rather than intermittent repairs. The project inspector advised Quintana's president that the contracting officer's representative would visit the site to discuss what he characterized as "the overrun in quantities on this particular item" (Tr. 19–21).

At the conference held at the site, the contracting officer's representative expressed the view that the price of $60 per ton was too high for the greater quantity of asphalt concrete being required for repairs and requested a lower unit price for the remainder of the work (Tr. 21).

Quintana's president protested that he had a large investment in getting his equipment to the job site, which included preparing five miles of access road and a temporary bridge over Boca Dam Spillway in order to bring in his equipment, since it was too heavy for the load limits on existing bridges. However,

[4] "46. *General*

"Before placing the 2-inch asphalt concrete paving, the contractor shall perform all work for repairing the bituminous surfacing of the Stampede Dam access road from immediately north of the S.P.R.R. crossing, near Boca Dam, to station 501+58. The areas to be repaired shall be thoroughly cleaned of all dirt and loose material, and shaped as necessary to provide a square shoulder in the direction of traffic. The area to be patched shall be primed with liquid asphalt in accordance with paragraph 49, and filled with asphalt concrete in accordance with paragraph 50, or as determined by the contracting officer." (Contract, Appeal File Document No. 3.)

[5] "50. *Asphalt Concrete*

"a. Description.—Asphalt concrete shall consist of a mixture of mineral aggregate and paving asphalt mixed at a central mixing plant and spread and compacted as described in these specifications or established by the contracting officer.

"The asphalt concrete shall be type B, and the mineral aggregate therefor shall be in accordance with the applicable provisions of section 39–2.04 of the Standard Specifications. The grading shall conform to ½-inch maximum size, medium grading. Paving asphalt to be mixed with the mineral aggregate shall be steam-refined asphalt having a penetration of 60–70 (or other penetration grade approved by the contracting officer) and shall be furnished and applied in accordance with the applicable provisions of sections 39–5 and 39–6 of the Standard Specifications.

"Where it is impracticable to place and compact the patching material for small areas as specified above, the material may be placed by hand or other approved methods and compacted by pneumatic tampers, small rollers, or other approved methods producing equivalent results.

"Compaction of the mixture shall begin as soon after placing as the mixture will bear without undue displacement. Delays in compacting the freshly spread mixture will not be tolerated.

"b. Measurement and payment.—Measurement for payment shall be made of the number of tons of material placed as directed by the contracting officer. Payment for asphalt concrete will be made at the unit price per ton bid in the schedule (item 3), which price shall include all costs of furnishing and mixing the mineral aggregate and paving asphalt, placing the asphalt concrete, compacting and finishing the surfacing." (Contract, Appeal File Document No. 3.)

within 24 hours he offered to reduce his unit price for the asphalt concrete to $48 per ton. The Government did not respond to Quintana's offer and the repair of the road surface continued without any agreement to reduce the contract price (Tr. 21–23).

After completion of the repairs on June 26, 1973, the Government paid Quintana for 361.55 tons of asphalt concrete under Item 3 at the contract price of $60 per ton. However, completion of the repairs required an additional quantity of 680.80 tons for which the Government declined to pay the contract price. Before reducing the contract price, the Contracting Officer held a conference with Quintana during which five separate items of work were discussed and agreement was reached on four of the items, leaving a dispute only as to the payment for the quantity of 680.80 tons of asphalt concrete under contract Item 3. Quintana pointed out that the Government had not accepted his offer of a reduced price, that he had not agreed to do the repairs as force account work and requested payment at the contract price.[6]

On November 7, 1973, the Contracting Officer issued a document entitled "Order for Changes No. 1" which directed Quintana to perform the five items of work and set forth the payment to be made for each item. In Paragraph 1, the Contracting Officer directed Quintana to rebuild designated areas of intermittent, badly cracked or displaced surface, using heavy construction and hauling equipment on larger areas which make it practical. Paragraph a set payment for such rebuilding as a lump sum of $15,861, which was the equivalent of $23.30 per ton for the 680.80 tons of asphalt concrete placed before completion of the repairs on June 26, 1973.[7] The Government computation of the lump sum was based on its records of the contractor's actual costs and included overhead and profit.[8]

After several conferences in which Quintana was unsuccessful in getting the Government to pay the contract price for the asphalt concrete required under Item 3, the Contracting Officer issued a Finding of Fact and Decision, dated January 31, 1974. The primary thrust of the decision was that the condition of the road required more extensive repairs than the Government, but not the contractor, had anticipated. The contractor's bid was submitted with knowledge obtained from an on-site inspection, prior to bidding, which disclosed that the estimated quantity for schedule Item 3 was very low. The Contracting Officer found that repair of the larger areas in the last half of the repair work made practical the use of larger equipment and made placement of the final 680.80 tons of asphalt concrete much less costly. In support of this conclusion, the Contracting Officer at-

[6] Findings of Fact and Decision by the Contracting Officer, dated January 31, 1974. (Appeal File Document No. 1.)

[7] Exhibit A, Appeal File Document No. 1.

[8] Exhibit B, Appeal File Document No. 1.

tached the Government's computation of Quintana's costs for the quantity of 680.80 tons, but offered no similar computation of the costs of placing the quantity of 361.55 tons for which the Government paid the full contract price. The decision rejected Quintana's contention that he had included the cost of preparing and maintaining the access road and temporary bridge, for which no direct payment was authorized pursuant to Paragraph No. 34 of the specifications, in his bid for Item No. 3 and that he had not recovered such cost in the quantity paid for at the contract rate.[9]

Quintana made a timely appeal of the Contracting Officer's findings and decision and in his complaint requested payment at the contract price for all the asphalt concrete required for repair of the road surface.

Decision

[1] The Government argues on brief that a claim should not be allowed merely because it is alleged. The point is well taken. However, in this case it is the Government which is alleging entitlement to an equitable adjustment. The burden of proving such entitlement rests with the Government.[10]

At the hearing, the Government called only one witness, the Chief of the Construction Branch of the Mid-Pacific Region of the Bureau of Reclamation, who prepared the document entitled "Order for Changes No. 1" dated November 7, 1973 (Tr. 33, 37). The Government witness testified that the estimate of 200 tons of asphalt concrete for repairing the road surface was prepared in February 1973, but that the major amount of any damage to a road in that area would occur during the thawing season between February and May (Tr. 52, 53). The Government witness attributed the discrepancy between the estimate and the quantity actually required to the damage which occurred after the estimate was prepared (Tr. 53).

The Government witness stated that the work was the same under the contract as under the change order, but the manner of doing it was different (Tr. 59). The Government did not direct Quintana to change the manner in which he completed the work (Tr. 69) nor did it direct his selection of equipment (Tr. 70). Although the Government witness conceded that selection of the equipment was left to the contractor (Tr. 62), he contended that a decrease in the contractor's unit cost required that an equitable adjustment be made (Tr. 62, 26). With the decrease in cost in mind, he determined that an order for changes should be issued (Tr. 63).

Such reasoning is a classic example of placing the cart before the horse. The changes clause provides for an equitable adjustment when a change directed by the Government results in an increase or a decrease

[9] Appeal File Document No. 1.

[10] See *Reading Clothing Mfg. Co.*, ASBCA No. 4153 (September 20, 1957), 57-2 BCA par. 1454.

in a contractor's cost of performance. It does not provide for the Government to take advantage of a decrease in cost resulting from a contractor's efficient operation where the work remains the same and the Government has directed no change in the manner of performance.

In the circumstances of this case, we attach no significance to the fact that the actual quantity exceeded the Government estimate by a considerable amount. Neither party can be said to have relied on the estimate. Quintana relied on his own site inspection which showed the estimate to be inaccurate (Tr. 25) while the Government contract administrator had knowledge that major damage could be expected during the spring thawing season after the estimate was prepared.[11]

Accordingly, the Board finds that Quintana was required by the terms of Paragraph 46 of the Special Conditions of the contract [12] to perform all work necessary for repairing the surface of the road and is therefore entitled to payment at the contract unit price per ton in schedule Item 3, pursuant to Paragraph 50b of the Special Conditions.[13] The Board further finds that the purported change in Paragraph 1 of the change order referred to a condition of the road which existed at the time the contract was awarded and the order effected no change in the work to be performed or in the manner of its performance.

Conclusion

The appeal is sustained in the amount of $24,987.[14]

G. Herbert Packwood,
Administrative Judge.

I CONCUR:

William F. McGraw,
Chief Administrative Judge.

[11] In a fact situation almost identical to the present case, the Court of Claims has held that a gross underestimate by the Government is not a proper basis for an equitable adjustment under the changed conditions clause which preceded the differing site conditions clause currently being used in Government contracts. *Perini Corporation, et al. v. United States,* 180 Ct. Cl. 768 (1967). At page 788, the Court stated:

"Thus, the situation presented by the facts before us is one where the estimated quantities contained in the contract were grossly understated by the Government. The contractor recognized that the estimate was unduly low and did not rely upon it. In view of all the information it had available to it, the Government should also have anticipated that plaintiff would encounter and have to pump more water than was pumped under the prior contract. It is in these circumstances that the Government asked us to find that a changed condition existed and that it is entitled to relief therefor under the Changed Conditions article. We decline, because it has never been the purpose of that article in the contract to protect a party from the results of its own miscalculations. We have so held in many cases involving claims by disappointed contractors. (Footnote omitted.) The same rule must be applied to the Government, for it is no more entitled to use its faulty estimate as a basis for invoking the benefit of the Changed Conditions article than is a careless contractor who makes an improvident bid."

[12] Footnote 4, *supra.*

[13] Footnote 5, *supra.*

[14] This represents payment at the contract unit price of $60 per ton for the 680.80 tons involved in the dispute less the amount previously paid under the change order of $15,861. The appellant's compromise offer of $48 per ton was not accepted by the Government and was withdrawn by the appellant prior to the taking of the instant appeal. The question presented involves determining the amount of equitable adjustment, if any, to which the Government is entitled on the basis of the evidence presented and not the amount that would have been acceptable to the appellant if the Government had chosen to settle rather than to have its claim adjudicated.

PERRY-ROSS COAL COMPANY

5 IBMA 5

Decided *July 25, 1975*

Appeal by Perry-Ross Coal Company from a decision by Administrative Law Judge Edmund M. Sweeney (Docket No. PITT 74–253), dated November 5, 1974, denying an Application for Review and affirming a Notice of Violation issued pursuant to section 104(b) of the Federal Coal Mine Health and Safety Act of 1969 [1] hereinafter the "Act."

Decision Vacated and Application Dismissed.

1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Generally

It is error for an Administrative Law Judge to render a decision on the merits in a review proceeding where a hearing on the merits is neither held nor waived by the parties.

2. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Dismissal of Applications

Failure of the Applicant for Review to attend a prehearing conference after receiving notice of its scheduling is ground for dismissal of the Application.

APPEARANCES: Leo M. Stepanian, Esq., for appellant, Perry-Ross Coal Company; Richard V. Backley, Esq., Assistant Solicitor, and Stephen Kramer, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

[1] 30 U.S.C. §§ 801–960 (1970).

OPINION BY CHIEF ADMINISTRATIVE JUDGE ROGERS

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On February 5, 1974, a Mining Enforcement and Safety Administration (MESA) inspector issued a section 104(b) Notice of Violation to Perry-Ross Coal Company (Perry-Ross) for allegedly violating 30 CFR 77.410 in that one of Perry-Ross' bulldozers did not have an automatic reversing alarm and another had an inoperative alarm. On February 14, Perry-Ross filed a timely Application for Review of this Notice, contending that the time set for abatement was unreasonable and that there was no violation either in fact or in law.

On September 4, 1974, an Administrative Law Judge (Judge) issued an order scheduling a hearing on the merits for October 8, 1974, in Arlington, Virginia. On September 26, 1974, Perry-Ross filed a Motion to Transfer Hearings, dated September 24, 1974, to either Butler or Pittsburgh, Pennsylvania. Also, on September 26, MESA filed a Motion to Dismiss Application for Review on the grounds that the time for abatement set in the Notice of Violation in issue had been indefinitely extended pending a final decision by the United States Court of Appeals for the Third Circuit in *Lucas Coal Company, et al.* v.

Rogers C. B. Morton, No. 74–1813.[2] In this motion counsel for MESA stated, "I have called the Counsel of Perry Ross about this Motion and he expressed no objections."

Without ruling on either of these motions, the Judge, on October 7, amended his order of notice of hearing to provide for a prehearing conference on all elements of the case to be held in Arlington, Virginia on October 22, 1974. On October 15, Perry-Ross filed a motion to continue the prehearing conference and the hearing during the pendency of the aforecited appeal in the Third Circuit Court of Appeals. In this motion, counsel for Perry-Ross stated that there was no reason for any type of conference because Perry-Ross and MESA had agreed that the case should be continued pending the outcome of the appeal in *Lucas*, *supra*.

Again, without ruling on this motion, the Judge held a prehearing conference on October 22, 1974, at which Perry-Ross failed to appear.

On November 5, 1974, without holding a hearing on the merits, the Judge issued a decision which, in addition to stating that there was no basis for granting Perry-Ross' motion for continuance, found that the conditions cited in the Notice had existed and that the Board's decision in *Lucas*, the case on appeal to the Third Circuit, *supra*, was dispositive of the issues before him. Accordingly, he affirmed the Notice and denied the Application for Review.

In its brief on appeal, Perry-Ross contends that the Judge's failure to rule, prior to issuing his decision, on its Motion for Continuance was an abuse of discretion which denied it due process of law. It also contends that the Judge erred in deciding the case in the absence of a hearing on the merits. In its reply brief, MESA took no position on the issues raised by Perry-Ross, but sought to clarify several "legal misrepresentations."

Issues Presented

A. Whether the Judge erred in issuing a decision on the merits without holding a hearing on the merits.

B. Whether the Judge erred in failing to rule on the prehearing motions filed by MESA and Perry-Ross.

Discussion

The Judge's decision in the instant case to deny the Application for Review and to affirm the section 104(b) Notice of Violation involved is a substantive ruling dispositive of the issues in the proceeding. This decision on the merits was rendered after counsel for Perry-Ross failed to appear, after proper notice, at a duly scheduled prehearing conference. This failure to appear might be viewed as an implied withdrawal by Perry-Ross of its Application for Review and which in the discretion of the Judge could result in the loss of the operator's right to have the matter adjudicated. We believe it

[2] This appeal concerns the applicability of 30 CFR 77.410 to bulldozers and other vehicles which have unobstructed vision to the rear.

well settled that failure to prosecute one's case may result in *dismissal* of that case. The United States Court of Appeals for the Fifth Circuit held in *Hyler* v. *Reynolds Metal Company*, 434 F. 2d 1064 (1970):

> It is well settled that a district court has inherent power to dismiss a case for failure to prosecute and there is no abuse of discretion when counsel fails to appear at a pre-trial conference and there is evidence of prior dilatory conduct. *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 82 S.Ct. 1386, 8 L. Ed. 2d 734 (1962).

[1] The Board is of the opinion that Administrative Law Judges and Article III Judges possess the same powers in this matter and that Perry-Ross exposed itself to the possibility of dismissal for its failure to appear. However, we hold it is error for the Judge to render a decision *on the merits* of the case in the absence of the applicant and a hearing. Additionally, if such a ruling were allowed to stand it would affect any subsequent section 109 proceeding involving the Notice.

B.

[2] In our review of the record we note that after receipt of the two motions of September 26 the Judge amended his notice of hearing to provide for a prehearing conference. The timing of this action would seem to indicate that he intended to take up these motions as well as any other prehearing matters which may have arisen at the conference. It would also seem that Perry-Ross would have had all the more reason to attend the conference after it filed its motion for a continuance which was not acted upon before the date of the conference. We are, therefore, of the opinion that a prehearing conference was justified if for no other reason than that the Judge could well have been uncertain as to whether Perry-Ross wished to continue the proceeding in light of MESA's statement that counsel for Perry-Ross had no objections to MESA's motion to dismiss. Accordingly, we believe that in these circumstances it behooved Perry-Ross to attend the prehearing conference or to at least make its position clear to the Judge prior to the conference. Its failure to do so was at its peril and it should not now be heard to complain of the Judge's failure to rule on the procedural motions before him. Inasmuch as we have held it was error for the Judge to issue a decision on the merits for the reasons stated above we believe the Application should be dismissed without prejudice.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS VACATED and the Application for Review IS DISMISSED WITHOUT PREJUDICE.

C. E. Rogers, Jr.,
Chief Administrative Judge.

I CONCUR:

Howard J. Schellenberg, Jr.,
Alternate Administrative Judge.

ESTATE OF EVANS INGATUAH

4 IBIA 103

Decided *July 29, 1975*

Appeal from an order denying petition for rehearing.

Affirmed.

1. Administrative Procedure: Administrative Procedure Act—Administrative Procedure: Administrative Review—Administrative Procedure: Initial Decision—Administrative Procedure: Substantial Evidence.

The ultimate findings, conclusions and order of the administrative law judge will not be set aside upon administrative review where they are supported by substantial evidence.

APPEARANCES: Cox, Fanning, McNamara & Bowen, by Linda J. Cook, for appellants; Idaho Legal Aid Services, Inc. by Robert L. La Roche, Esq., for appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

This matter comes before the Board on an appeal from an order denying petition for rehearing.

The appeal is brought on the grounds that a ceremonial marriage under State Law cannot be dissolved by Indian custom divorce; that the record does not support the findings and conclusions that the prior marriage of Louise Ottogary to Lynn Perry was ever dissolved by a valid Indian custom marriage; and that the Judge's Order dated November 14, 1974, was an abuse of his discretion in applying and interpreting the requirements of 43 CFR 4.241 (a) and the purpose of the regulations as set forth in the *Estate of Frank Jones*, 1 IBIA 345, 79 I.D. 697 (1972).

These contentions in essence are similar to those raised in appellants' petition for rehearing.

Having reviewed the record, including transcript of testimony taken at hearing held at Fort Hall, Idaho, on October 16, 1973, and briefs of appellants and appellee, the Board finds that the appellants have shown no reason why the findings, conclusions, and Order of the Administrative Law Judge should not be affirmed.

[1] We hold that there is substantial evidence in the record to support the findings, conclusions, and order of the Administrative Law Judge.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is hereby dismissed and the Order Determining Heirs dated August 19, 1974 is AFFIRMED.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

LECKIE SMOKELESS COAL COMPANY

5 IBMA 12

Decided *July 29, 1975*

Appeal by the Mining Enforcement and Safety Administration (hereinafter MESA) from an Initial Decision, dated March 7, 1975, by Administrative Law Judge George A. Koutras (Judge), in Docket No. HOPE 75–63–P assessing penalties for 11 violations and vacating notices for two violations of the Federal Coal Mine Health and Safety Act of 1969 [1] (hereinafter the Act), alleged by MESA at No. 47 Mine, Rupert, Greenbrier County, West Virginia.

Affirmed in part, and reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Recording Examinations

The results of examinations of emergency escapeways and facilities and for smokers' articles must be recorded weekly pursuant to 30 CFR 75.1801 as read in conjunction with 30 CFR 75.1702 and 30 CFR 75.1704.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and Stephen Kramer, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

[1] 30 U.S.C. §§ 801–960 (1970).

MEMORANDUM OPINION AND ORDER

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

This appeal contests one of the two notices vacated in a section 109(a) proceeding to assess penalties for alleged violations. After a hearing, in which Leckie Smokeless Coal Company (Leckie) took no part, the Judge, pursuant to the provisions of 43 CFR 4.544, found that 11 of the violations charged had occurred, and after consideration of the statutory criteria set forth in section 109(a) of the Act, assessed penalties in the total amount of $1,425. A timely Notice of Appeal and subsequent brief were filed by MESA. No reply brief was submitted.

Notice of Violation 5 F.C.S., September 1, 1973, the subject of this appeal, charges the lack of recording of the required weekly examinations of emergency escapeways and facilities, smokers' articles, and fire doors in violation of 30 CFR 75.1801. The appellant, MESA, urges on appeal that this Notice was improperly vacated by the Judge in light of the clear language of the regulation 30 CFR 75.1801 when read in conjunction with 75.1704–2. The Judge held that the results of such weekly examinations need not be recorded on a weekly basis ac-

cording to § 75.1801 and that 30 CFR 75.1702 and 1704 contain no time frame for such recording.

Issue Presented

Whether the weekly examinations of escapeways and facilities, fire doors and smokers' articles as required by 30 CFR 75.1704–2 must be recorded weekly in the book prescribed in 30 CFR 75.1801.

Opinion

[1] The Board concurs with the view of MESA that 30 CFR 75.1801 requires weekly recording of the required examinations.

30 CFR 75.1801 reads as follows:

> *The results of examinations* of emergency escapeways and facilities, fire doors, and for smokers' articles required to be *conducted under the provisions of* §§ 75.1702, *75.1704*, and 75.1708, *shall be recorded in a book entitled "Examinations of Emergency Escapeways and Facilities; Smokers' Articles; Fire Doors"* (Mining Enforcement and Safety Administration Form 6–1331, Budget Bureau No. 42–R1589, March 1970). (Italics added)

30 CFR 75.1704 states in applicable part that:

> * * * Escape facilities approved by the Secretary or his authorized representative, properly maintained *and frequently tested*, shall be present * * *. (Italics added)

30 CFR 75.1704–2(c)(1) defines the meaning of "frequently tested."

> All escapeways shall be examined in their entirety at least *once each week* by a certified person. * * * *The phrase "once each week" shall mean at intervals not exceeding seven days.* (Italics added)

We think it clear that in order to give full meaning to the aforequoted regulations, the results of the required weekly examinations must be recorded on the same basis. Any other interpretation would effectively render the requirement for recording a nullity. Furthermore, the book (Form 6–1331) supplied to the operator by MESA for the purpose of recording various examinations makes clear that the results of examinations of escapeways are to be recorded therein on a weekly basis.[2] The examinations required on a weekly basis clearly were not being recorded on a weekly basis and as to that requirement we hold the Notice to have been validly issued and should be reinstated.

The findings of the Judge with respect to history of previous violations, size of business, and ability to stay in business are adopted by the Board. The following proposed findings, conclusions, and recommended penalty submitted by MESA with respect to the reinstated violation are also adopted. Additionally, we make the following findings:

Gravity:

The fact that the results of examinations of emergency escapeways and facilities were not being recorded weekly is of a nonserious character and we so find.

Negligence:

The operator and his supervisory personnel were on notice of the re-

[2] The Board has taken official notice of MESA Form 6–1331 to the extent indicated. However, our conclusion herein rests upon our reading and interpretation of the regulations involved and would be the same even in the absence of such official notice.

quirements to record the results of the examinations of emergency escapeways and facilities in the book provided for this purpose. The failure to do so was negligence. Therefore, we find that the violation was caused by the operator's negligence.

Good Faith:

We find that the operator demonstrated good faith in compliance.

We adopt the penalty for this violation recommended by MESA in the amount of $19.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in Docket No. HOPE 75-63-P IS MODIFIED by reinstating Notice 5 F.C.S., September 1, 1973, and assessing a penalty of $19 therefor, and that the total assessment of $1,444 SHALL BE PAID by the Leckie Smokeless Coal Company within 30 days of this Order.

C. E. ROGERS, JR.,
Chief Administrative Judge.

DAVID DOANE,
Administrative Judge.

OLD BEN COAL COMPANY

5 IBMA 19

Decided *July 30, 1975*

Appeal by the United Mine Workers of America from a decision by Administrative Law Judge Paul Merlin vacating orders of withdrawal in Docket Nos. VINC 74-188, VINC 74-336, VINC 74-871, VINC 75-259, and VINC 75-260.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Parties: Failure to Answer

Under 43 CFR 4.507, a "statutory party" who fails to file an initial responsive pleading loses its status as a party and is subject to dismissal.

2. Federal Coal Mine Health and Safety Act of 1969: Parties: Failure to Participate

The Interior Board of Mine Operations Appeals will not overturn an Administrative Law Judge's dismissal of a party in a review proceeding for deliberate and persistent failure to participate where no abuse of discretion has been shown.

APPEARANCES: Steven B. Jacobson, Esq., for appellant, United Mine Workers of America; Thomas H. Barnard, Esq., and Vilma L. Kohn, Esq., for appellee, Old Ben Coal Company.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

The United Mine Workers of America (UMWA) appeals from a decision of Administrative Law Judge Paul B. Merlin vacating a notice of violation and various withdrawal orders issued pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act

of 1969. 30 U.S.C. § 814(c)(1) (1970). Although UMWA challenges the decision below on substantive grounds, the Union in addition challenges the propriety of the Administrative Law Judge's order dismissing it on the ground of persistent failure to participate pursuant to 43 CFR 4.507.

Old Ben Coal Company (Old Ben), the applicant for review below, has filed a motion to strike the UMWA's notice of appeal, contending in substance that a lack of participation below precludes any appeal of a dismissal to the Board.

The procedural issues posed by the UMWA's appeal and Old Ben's motion to strike in IBMA 75–42 are similar to those pending in several other appeals, and in the interest of facilitating the disposition of those cases, the Board deemed it appropriate to deal with these procedural matters first and postpone consideration of the claims of substantive error. Accordingly, the Board ordered submission of briefs limited to the procedural questions presented and suspended the briefing schedule with respect to other issues.

Having considered the briefs and the record, we have decided for the reasons set forth below to deny Old Ben's motion to strike and to affirm the subject order of dismissal in IBMA 75–42 without prejudice to a motion by the UMWA for leave to intervene or to file an *amicus curiae* brief in Appeal No. IBMA 75–41 where the Mining Enforcement and Safety Administration (MESA) is also appealing Judge Merlin's decision in the above-listed dockets.

Procedural Background

The five hearing dockets involved in this case are: VINC 74–188, 74–336, 74–871, 75–259, and 75–260. Each concerns an application for review filed pursuant to section 105 of the Act, 30 U.S.C. § 815 (1970), and they were consolidated below for the purpose of an initial decision.

With the exception of Docket No. VINC 74–188, the UMWA filed a timely answer in opposition with respect to each of the subject dockets. In each instance, the answer submitted by the UMWA amounted only to a denial of the allegations in the application for review.

Judge Merlin issued notices of hearing for the above-listed dockets setting the hearing date and requiring "* * * a preliminary statement setting forth (a) lists of exhibits and witnesses together with the parties' synopses of expected testimony; (b) any stipulations entered into; (c) the parties' statement of the issues; and (d) a memorandum of law on any legal issue raised by a party with citations of the principal authorities." Although these notices, as well as any amendments thereof, were sent to and received by the UMWA, the Union failed to respond to or comply with the Judge's notice and order in any respect.

The UMWA did not appear to "present information" at any of the hearings involved in the dockets

now before the Board. Neither did the UMWA, subsequent to the issuance of the decision below and prior to the filing of the subject appeal, petition Judge Merlin for intervention, or for rehearing, or reconsideration. 43 CFR 4.507(c), 4.510, 4.513, and 4.582(c).

The UMWA was orally dismissed by Judge Merlin at the outset of each of the hearings. The orders of dismissal were reconfirmed in the Judge's decision, dated March 6, 1975, and it is from this decision that the UMWA appeals.

The UMWA timely filed a notice of appeal with respect to the subject hearing dockets on March 25, 1975.

On April 1, 1975, Old Ben moved the Board to strike the UMWA's notice of appeal, citing the dismissal below and the persistent failure of UMWA to participate.

By order dated April 15, 1975, the Board required submission of briefs on the issues concerning the UMWA's dismissal by the Judge and suspended the briefing schedule with respect to all other issues. Both the UMWA and Old Ben have complied with that order. Although invited to do so, MESA declined to take a position in this matter.

Issues on Appeal

A. Whether an Administrative Law Judge may dismiss a party from a proceeding when such party fails to participate or otherwise "present information" within the meaning of section 105(a) of the Act.

B. Whether the Administrative Law Judge abused his discretion in dismissing the UMWA as a party.

Discussion

A.

The UMWA argues in substance that, after filing an answer to an application for review, a responding party has no obligation either to comply with prehearing orders, or to "present information" at the evidentiary hearing, or to file posthearing briefs or motions. It insists that deliberate and persistent failure to participate does not subject it to the risk of dismissal and that an Administrative Law Judge lacks discretion to dismiss on that ground.

Before disposing of these contentions, we must first deal with the question of whether the UMWA may maintain this appeal under any circumstances. Old Ben has moved to strike the UMWA's notice of appeal on the theory that the dismissal below operates as a bar to appeal.

Under 43 CFR 4.600, any party to an adjudicative proceeding under the Act may appeal to the Board from an adverse initial decision by filing an adequate and timely notice of appeal. A motion to strike a notice of appeal will lie where the person who filed such notice admits that it was not a party below or where such notice is inadequate or untimely filed. In the case at hand, the UMWA claims to have been a party, having allegedly filed an answer in each of the above-listed

dockets as required under 43 CFR 4.507(c). To hold that an apparent party may not appeal to the Board from a dismissal under 43 CFR 4.507(c) to test whether that regulation was correctly applied would deprive such party of the opportunity to exhaust its administrative remedies by timely seeking a determination from the Secretarial delegate charged with the obligation of rendering final adjudicative decisions for the Department, namely, the Board of Mine Operations Appeals. Accordingly, the motion to strike will be denied.

Having disposed of this preliminary matter, we turn now to the merits of the UMWA's challenge to the Judge's order of dismissal.

[1] An examination of the record in the case at hand reveals that the UMWA submitted timely answers with respect to each of the dockets now before us, except Docket No. VINC 74–188. 43 CFR 4.531. With respect to the latter, the Union lost its status as a party and we note in passing that it has not sought permission to intervene upon a showing of good cause. Accordingly, we will affirm the dismissal of that docket.

[2] With respect to the four remaining dockets, there remains the question of whether the dismissal for non-participation can be upheld in view of the language of 43 CFR 4.507(c) which is silent with respect to such dismissals.

In *Old Ben Coal Corp.*, 4 IBMA 104, 82 I.D. 160, 1974–1975 OSHD par. 19,511 (1975), we said that an Administrative Law Judge has discretion to dismiss a party who deliberately and persistently fails to participate in a review proceeding. In reaching that conclusion, we relied principally on the provision of subsection (a) of section 105 of the Act which confers status on an operator or representative of miners in a mine affected by a withdrawal order enabling such person "* * * *to present information* relating to the issuance and continuance * * * or the modification or termination * * *" of such order. We concluded that the conferral of such status by law carried with it the implied obligation "* * * to participate in the proceeding at least to the extent of making its position clear to the other parties to the proceeeding and to the Administrative Law Judge. * * *" 4 IBMA at 109, 82 I.D. at 162. While we recognized that in section 105 the Congress specifically relieved an affected operator or representative of miners, as appropriate, of the obligation to seek leave to intervene *initially*, we could not attribute to the legislators an intent to confer on such a person the right to drop in and drop out of stages of administrative proceedings at will and without notice to the Judge or other parties.

We drew additional support for our views from cases in the federal courts holding in substance that persistent and deliberate lack of due diligence in prosecuting a claim is prejudicial to the orderly and expeditious disposition of cases and that parties indulging in such behavior are subject to dismissal, with or without prejudice, *sua sponte*, and

without notice. *See Link.* v. *Wabash Railroad Co.*, 370 U.S. 626 (1962), *aff'g* 291 F. 2d 542 (7th Cir. 1961); *Flaksa* v. *Little River Marine Construction Co.*, 389 F. 2d 885 (5th Cir. 1968), *cert. denied*, 392 U.S. 928 (1968).[1] It seemed to us then, as it does now, that permitting any person to skip the hearing stage and postpone litigation to the appellate stage is subversive of the administrative process prescribed in the Secretary's regulations. Those regulations provide for an appeal after an initial decision has been rendered by an Administrative Law Judge with respect to the matters which form the basis of appeal.

In responding to the Board's reasoning in *Old Ben Coal Corp.*, *supra*, the UMWA presents several arguments which deserve treatment.

First, the UMWA points out that the regulations authorize dismissal of a responding party where no timely answer is filed, but are silent with respect to other procedural defaults. The Union would have us apply the express mention — implied exclusion doctrine of statutory construction[2] and conclude that only the failure to file an answer will justify a dismissal for failure to participate. While we have relied on that doctrine in the past, where appropriate, it is only a guide to construction rather than a conclusive argument. *See S.E.C.* v. *Joiner Leasing Corp.*, 320 U.S. 344, 350–1 (1943); *North American Coal Corp.*, 3 IBMA 93, 117–118, n. 16, 81 I.D. 204, 1974–1975 OSHD par. 17,658 (1974). In this case, it would be inappropriate to apply that doctrine because 43 CFR 4.507 does not purport to be an exhaustive catalog of procedural failures which will justify dismissal. Moreover, the discretion to dismiss in this context does not depend on the

[1] The UMWA seeks to distinguish *Link* on the ground that the plaintiff in that case was not relying on the appearance of a co-plaintiff. This argument is self-defeating because it represents a concession that the Union had no information to present, and after all, the presentation of information is the sole purpose for the grant of status to participate by law. 30 U.S.C. § 815(a) (1970).

In addition, the Union attacks the authority of the *Link* precedent on the grounds that two Justices did not participate, that the case was decided by a 4–3 vote, and that Mr. Justice Black dissented. We think that none of these considerations impairs the precedential value of *Link* and we note before passing on that the Court denied rehearing in that case. 371 U.S. 873 (1962).

Finally, the Union submits that the courts of appeals have not followed *Link* v. *Wabash Railroad Co., supra,* and alludes to *Flaksa* v. *Little River Marine Construction Co., supra,* as an example. A sample of court of appeals precedents dealing with the failure to prosecute claims diligently reveals that the *Link* principle has not been eroded and that the real question for decision in these cases has been whether the trial court abused its discretion rather than whether there was discretion at all. *Compare S.E.C.* v. *Power Resources Corp.*, 495 F. 2d 297 (10th Cir. 1974) and *Beshear* v. *Weinzapfel*, 474 F. 2d 127 (7th Cir. 1973) *with Spering* v. *Butadiene and Chemical Corp.*, 434 F. 2d 677 (3d Cir. 1970), *cert. denied*, 404 U.S. 854 (1971). *See* also *Bautista* v. *Concentrated Employment Program of the Department of Labor*, 459 F. 2d 1019 (9th Cir. 1972). The *Flaksa* case, a decision of the Fifth Circuit, is similar in its approach to the cases just cited and from the procedural point of view bears a remarkable resemblance to application for review procedures. There, a responding party was dismissed by a trial judge for failure to prosecute its claim diligently and the court of appeals, although agreeing to the existence of discretion in this matter, reversed for an abuse thereof.

[2] *Expressio unius est exclusio alterius.*

existence of a statute or rule; such discretion is inherent in an adjudicative tribunal. *See Link* v. *Wabash Railroad Co.*, *supra*, and *Flaska* v. *Little River Marine Construction Co.*, *supra*.

Second, the UMWA contends that it should be treated as a "protected party," and as such, entitled to rely upon the Government's presentation without forfeiting any rights. In this connection, the Union claims, without any supporting citation, that the National Labor Relations Board (NLRB) does not require a "protected party" to participate fully at the hearing level and argues that we ought to follow the NLRB's example. We reject the Union's contention as a matter of law because our Act, unlike those administered by the NLRB, grants an affected representative of miners or operator party status only for the purpose of "presenting information." Moreover, we are not bound by NLRB practices.

Third, the UMWA denies that any prejudice can result from its non-participation below because it would be limited on appeal to the issues tendered by the Government to the Judge for his decision. This argument is in our judgment quite beside the point. The Union does not appreciate that the Secretary's regulations were designed to provide the *right* to seek administrative appellate relief to a person who has presented his or her contentions personally to an Administrative Law Judge and has had them denied. We reject the Union's claim that under 43 CFR 4.600 any person aggrieved by an initial decision is a "party" and can appeal to the Board *as a matter of right* whether or not such person participated below.

Lastly, the Union maintains that it would be unfair to deprive it and others similarly situated of the opportunity to be heard simply because they find full participation in all review proceedings financially burdensome. We think that this contention is without merit because it rests upon a fallacious premise. The Union assumes that dismissal for deliberate, persistent failure to participate is mandatory and that such dismissal automatically bars it, or any other similarly situated responding party below, from expressing its position at a later point should it become interested in a given case and have something to contribute. As we said in *Old Ben Coal Corp.*, *supra*, dismissal for the reason now under discussion is discretionary with the Judge and may be without prejudice. Whether a plea of relative poverty will justify deliberate and persistent non-participation is a question we need not decide since the Union has not made such a claim for itself. Furthermore, later participation can take place with the permission of the Judge after the filing of a motion for leave to intervene or for reconsideration of the dismissal. *See* 43 CFR 4.507(c), 4.510, and 4.513. If the Government files a notice of

appeal, the Judge's jurisdiction terminates by operation of law and the Union must seek leave to intervene, or in the alternative, to participate as an *amicus curiae*, from the Board. 43 CFR 4.582(c). In any event, dismissal for deliberate, persistent non-participation is not an automatic and absolute bar to subsequent intervention; it merely clears from the record extraneous and apparently unconcerned persons, and prevents disruption of the orderly processing of litigation.

Having duly considered and rejected the UMWA's arguments, we adhere to the position set forth in *Old Ben Coal Corp., supra.* An Administrative Law Judge does have discretion to dismiss a responding party in a review proceeding where such party deliberately and persistently fails to participate. Subsequent to dismissal, any further participation is subject to the approval of the Judge or the Board, as appriate.

B.

We turn now to the question of whether the Judge abused his discretion in dismissing the UMWA at the outset of the hearing or when he reconfirmed his order in his written decision.

While dismissal without prejudice might have been a more appropriate response than outright dismissal to the UMWA's failure to respond to prehearing orders, we are of the opinion that the reconfirmation of that dismissal in the initial decision was not an abuse of discretion inasmuch as the UMWA failed to participate in any *meaningful* way by "presenting information" to the Judge. We note as well that the Union did not seek reconsideration by the Judge of his dismissal and has not stated any satisfactory excuse for deliberately standing mute until the appellate stage.

Accordingly, we are affirming the dismissal below without prejudice to a motion for leave to intervene, or in the alternative, to file an *amicus curiae* brief in the Government's appeal from the Judge's decision.

ORDER

WHEREFORE, pursuant to authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that Old Ben's motion to strike the UMWA's notice of appeal IS DENIED. IT IS FURTHER ORDERED that the dismissal of the UMWA in the above-captioned dockets IS AFFIRMED for the reasons stated in the foregoing opinion without prejudice to the filing of a motion for leave to intervene or to participate as an *amicus curiae* in IBMA 75-41.

DAVID DOANE,
Administrative Judge.

I CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

IN THE MATTER OF AFFINITY MINING COMPANY (KEYSTONE NO. 5 MINE)

v.

MINING ENFORCEMENT AND SAFETY ADMINISTRATION, UMWA

5 IBMA 36

Decided *July 31, 1975*

The Board has for consideration the certification of an interlocutory ruling by Chief Administrative Law Judge L. K. Luoma (Docket No. M 75-98), dated May 6, 1975, denying a motion of the Mining Enforcement and Safety Administration (hereinafter MESA) to dismiss a petition for modification of a roof control plan filed pursuant to section 301(c) of the Federal Coal Mine Health and Safety Act of 1969.[1] (Hereinafter the "Act.")

Certification of Interlocutory Ruling.

1. Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Safety Standards: Roof Control Plans.

The Secretary's authority to approve or disapprove roof control plans and revisions thereof under section 302(a) of the Act has been delegated exclusively to MESA, and such plans are not subject to modification by way of petitions to modify the application of a mandatory standard filed pursuant to section 301(c) of the Act.

APPEARANCES: Michael V. Durkin, Esq., for appellant, Mining Enforcement and Safety Administration; James R. Kyper, for appellee, Affinity Mining Company; Steven B. Jacobson, Esq., for United Mine Workers of America.

MEMORANDUM OPINION AND ORDER

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On March 10, 1975, Affinity Mining Company (hereinafter Affinity) filed a section 301(c) Petition for Modification of a roof control plan applicable to Keystone No. 5 coal mine located at Midway, Raleigh County, West Virginia. Affinity states that it anticipated encountering an area, within three to six months, having a solid sandstone roof, that for this reason proposed a "Special Plan" to MESA for roof control in such area. Affinity further states that MESA has refused to approve the proposed plan although it had previously approved the other parts of the roof control plan for the mine. The petition to modify requests approval of the "Special Plan" as a modification of the provisions insisted upon by MESA on the theory that such provisions are mandatory standards.

On March 31, 1975, MESA filed a motion to dismiss the petition on the ground that a roof control plan is not a "mandatory standard" subject to modification under section 301(c) of the Act. The motion was denied on April 18, 1975, by Chief Administrative Law Judge L. K. Luoma (Judge) for the stated reason that he was not persuaded that a roof control plan was not a man-

[1] 30 U.S.C. §§ 801-960 (1970).

datory standard subject to modification within the meaning of section 301(c) of the Act. On May 6, 1975, this ruling was certified by the Judge to this Board inasmuch as the ruling presents a controlling question of law and immediate appeal therefrom would materially advance the disposiiton of this matter.

On May 13, 1975, the Board ordered the filing of briefs and briefs were received from the Affinity Mining Company, MESA, and the United Mine Workers of America. Oral argument before the Board was held on June 12, 1975. Affinity Mining Company and MESA were represented at oral argument. The UMWA did not participate.

Contentions of the Parties

Affinity contends that the language of section 302 of the Act setting forth the requirements for a roof control plan when read together with the language in section 301 wherein that section refers to sections 302 through 318 as "interim mandatory safety standards" indicates that an approved roof control plan itself is a mandatory safety standard and thus subject to being modified via a petition filed under 301(c). Two decisions: *Zeigler Coal Company*, 2 IBMA 216, 80 I.D. 626, 1973–1974 OSHD par. 16,608 (1973); and *North American Coal Corporation*, 3 IBMA 93, 81 I.D. 204, 1973–1974 OSHD par. 17,658 (1974), are cited by Affinity in support of its contention that this Board has heretofore held that roof control plans are "mandatory standards." In those cases we held that the *provisions* of a roof control plan were enforceable as mandatory standards. In its brief Affinity also argues: "In effect, MESA is contending that to review the adequacy or appropriateness of the provisions of a roof control plan, an operator must violate section 302 by failing to have an approved roof control plan or by failing to comply with it. Such contention is illogical and absurd." Affinity further contends that to deny it an opportunity for a hearing to determine by fact-finding whether its proposed plan is as safe or safer than the provisions insisted upon by MESA would, in effect, leave it with no administrative remedy, *i.e.*, no impartial review of MESA's arbitrary refusal to approve its proposed plan.

MESA contends that individual roof control plans developed by the operator are not embraced within the definition of mandatory health or safety standards set out in section 3(l) of the Act and that section 301(c) was designed specifically to permit petitions to modify the application only of mandatory safety standards generally applicable to all mines. Therefore, MESA reasons that such individual plans cannot by their very nature be sub-

ject to the provisions of section 301(c). MESA argues that the provisions of a roof control plan, once adopted, are enforceable by the Secretary as "mandatory standards" *for that mine*, but are not thereafter susceptible to being modified by petitions filed under 301(c) but only by revisions approved by MESA. MESA further contends that the Secretary has delegated no authority to the Office of Hearings and Appeals to review decisions of MESA or resolve issues between MESA and the operator arising from its approval or disapproval of proposed roof control plans and revisions thereof. MESA states that the operator's only avenue of relief from an adverse decision would be in the United States District Court.

The United Mine Workers of America (UMWA) contends that review of the determination of MESA with respect to approval of roof control plans by the Office of Hearings and Appeals (this Board) would amount to review of the Secretary by the Secretary which would be an anomalous procedure. In substance UMWA concurs in MESA's view that a roof control plan is not a "mandatory safety standard" subject to modification under section 301(c) since the very purpose of section 302(a) is to provide special requirements for an individual mine and that such statutory mandate is satisfied by restricting to MESA the practice of approving and revising such plans as it deems appropriate to the circumstances encountered in each underground mine.

Issue Presented

Whether the provisions of a roof control plan and revisions thereof are "mandatory safety standards" subject to modification by petition under section 301(c) of the Act.

Discussion

The ruling by the Judge denying MESA's motion to dismiss appears to be based solely upon his view that a roof control plan is a "mandatory standard" as that term is used in the Act. The Board believes, however, that the basic question before it is whether a roof control plan is subject to modification under section 301(c) of the Act.

Section 302(a) of the Act requires that "A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form within sixty days after the operative date of this title" and that "Such plan shall be reviewed periodically, at least every six months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs." The Board is of the opinion that any failure by an operator to comply with the requirement of this section would clearly constitute a violation of the Act and as such would be subject to the issuance of notices and orders, as appropriate, under section 104 of the Act.

Section 3(l) of the Act recites the following definition:

"mandatory health or safety standard" means the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act; * * *.

Our interpretation of the above-quoted subsections is that the bare requirement of section 302(a) that an operator develop and adopt an approved roof control plan is itself a mandatory safety standard. We are further of the opinion that the individual provisions of a roof control plan, once adopted and approved by the Secretary, become enforceable as "mandatory standards" as to the particular mine for which the plan was approved. Clearly, it was not the intention of the Congress to require each operator to have an approved roof control plan but leave the Secretary helpless to enforce its provisions. Indeed the legislative history of the Act is replete on the subject of the need to devise, adopt, and enforce stringent measures to minimize the hazard of roof falls and to require the Secretary to monitor each mine's roof control plan periodically. The history of section 302 (a) illustrates the realization by Congress that varying underground structures and differing circumstances would require individually tailored roof control plans and that it was for this reason the Congress did not attempt to set forth specific roof control standards generally applicable to all underground mines. It was well recognized by the Congress, and the Board takes notice of the fact, that roof falls have been the heaviest cause of injuries and fatalities to miners.

In the case at hand, the MESA District Manager has refused to approve a proposed "special plan" submitted by Affinity as an addition or revision to its existing plan for the apparent reason that he does not believe the proposal could afford a satisfactory degree of safety to the miners. Affinity disagrees and maintains that its proposal would be as safe or safer than the provisions urged by MESA. It was in an attempt to resolve this impasse by a hearing before an Administrative Law Judge that Affinity filed its petition to modify under section 301 (c). No other procedure appeared to be available to it.

[1] Although the Board adheres to its position that the provisions of a roof control plan are enforceable by the Secretary in the same manner as a generally applicable mandatory standard, we cannot and do not hold that the provisions of a plan, which are specially tailored to the particular mine and conditions involved, are subject to being modified by way of a petition filed under section 301 (c). As we view it, it was the intention of the Congress in section 301 (c) to recognize that the legislative mandatory standards applicable to *all* mines, including those adopted by rulemaking, might require modification of their application in

some mines and to provide a procedure whereby an operator could petition for such modification of the application of a *generally applicable* mandatory standard. However, where a standard, provision, or requirement is itself designed and adopted only for a particular mine or situation in a mine, we think it would be illogical to construe the intention of section 301(c) so as to permit a petition for modification of such a specially designed plan. We also note that section 302(a) of the Act places the initial burden on the *operator* to develop such individual plans.

Another aspect of the jurisdictional question here presented is whether the Act or Secretarial regulations and delegations of authority issued thereunder envisage or provide for any administrative (fact-finding) review in instances where the Secretary (MESA) withholds approval of a proposed plan. We find nothing in the Act or regulations which contemplates or requires such type of administrative review. In many instances the Act or regulations are specific in providing an opportunity and procedures for a public hearing, or for the instigation of rulemaking, as appropriate, but no such provision has been made for situations such as here presented. Furthermore, we note that the Secretary, under his delegation of enforcement powers to MESA, has included in such delegation his authority to approve (or disapprove) roof control plans and revisions thereof under section 302(a).[2] We do not find that the Secretary has delegated any authority to the Administrative Law Judges or to this Board to review proposed revisions of roof control plans or to resolve issues concerning their approval.[3] We do believe, however, that it was contemplated under the Act that roof control plans developed by the operator would be subject to negotiation between the operator and MESA. Therefore, we must concur in the position taken by MESA that the final approval or disapproval of roof control plans and revisions thereof are exclusively functions of the enforcement arm of the Secretary, MESA, and that such actions are not within the jurisdiction of the Office of Hearings and Appeals.

Although we are fully aware that our opinion leaves Affinity in the position of having no recourse to the hearing and adjudicative machinery provided within the Office of Hearings and Appeals on the question here presented, this should not preclude Affinity from obtaining a final Departmental decision in the matter and access to the courts. In this connection we observe that Affinity may seek reconsideration of its proposal from the Office of the Administrator of MESA in an attempt to mediate the issues involved and with a view toward obtaining a final Departmental decision. The record reflects that Affinity has not

[2] 218 DM 1.1, 38 FR. 18695.
[3] 211 DM 13.6, 43 CFR 4.1.

sought such review of the decision of the MESA District Manager. We are informed that the Office of the Administrator of MESA frequently does entertain review of such decisions of its District Managers, particularly since roof control plans are continuously under review and revision by MESA.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the motion by MESA to dismiss the Petition for Modification filed by Affinity Mining Company MUST BE GRANTED.

C. E. ROGERS, JR.,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

ADMINISTRATIVE JUDGE DOANE, CONCURRING IN PART AND DISSENTING IN PART:

Although I concur with the majority that the provisions of approved roof control plans *are* enforceable mandatory safety standards, I respectfully dissent from that part of the foregoing majority opinion holding that such plans are not subject to administrative adjudication under section 301(c) of the Act, 30 U.S.C. § 861(c) (1970).

I have four basic reasons for my dissent. First, particularly after concluding that approved roof control plans *are* enforceable mandatory standards, I believe the majority opinion wrongfully ignores the literal and unambiguous language of section 301(c) which extends coverage to "*any* mandatory safety standard" (italics added).[1] Second, by invoking the "generally applicable mandatory standard" concept, the majority unduly limits the congressionally intended utilization of section 301(c) as a remedial tool by the operators and the representatives of miners.[2] Third, the majority opinion has the effect of incorrectly depriving an operator or a representative of miners as appropriate, of the right to have a reviewable administrative record made which I believe was contemplated by the requirements of section 106 of the Act,

[1] The language in the first sentence of section 301(c) of the Act, 30 U.S.C. § 861(c) (1970), provides: "Upon petition by the operator or the representative of miners, the Secretary may modify the application of *any* mandatory safety standard to a mine * * *." (Italics supplied).

[2] I have been unable to find language anywhere in the Act or the regulations where section 301(c) is confined to so-called "generally applicable mandatory standards." However, I find support for the contrary view in the legislative history which shows the intent of Congress to provide to representatives of miners relief by use of section 301(c) from exceptions to mandatory standards granted under section 301(d) of the Act. *See* the last two sentences of the summary of the discussion of section 301, page 1126. *House Comm. on Ed. and Labor, Legislative History, Federal Coal Mine Health and Safety Act,* Comm. Print, 91st Congress, 2d Session, pp. 1125–26.

30 U.S.C. § 816 (1970), providing for judicial review.[3] Fourth, I believe the majority opinion addresses itself to issues other than those actually presented by the certified ruling in direct violation of 43 CFR 4.602 (d).[4] Accordingly, I do not deem myself precluded by the majority opinion in some future appropriate case to deal with the question of the reviewability by the Board of a charge of arbitrary and capricious action by any representative of the Secretary pertaining to the enforcement of the subject Act.

DAVID DOANE,
Administrative Judge.

[3] After providing generally for judicial review by a United States court of appeals of any order or decision issued by the Secretary, except with respect to penalty cases, subparagraph (b) of that section provides, *inter alia:* "The court shall hear such petition *on the record* made before the Secretary * * *." (*Italics supplied.*) It seems to me that one of the principal purposes for creating the Office of Hearings and Appeals within the Department was to provide the adjudicative machinery for making just such a record. Nowhere within the departmental regulations do I find any procedure for the making of an administrative record for judicial review by the administrative superiors of the District Managers as envisaged by the majority.

[4] The only two issues presented by the certified ruling and initially recognized by the majority opinion are: (1) whether a roof control plan is a mandatory standard, and (2) whether a roof control plan is subject to modification under section 301(c) of the Act. I submit that (a) whether there is some administrative (fact-finding) review, apart from section 301(c) procedures, of approval or disapproval of proposed roof control plans, or (b) other types of relief which may be available to operators situated similarly to Affinity's position, is beyond the scope of review of the certified ruling here presented. Section 4.602(d) of 43 CFR provides: "If an interlocutory appeal is permitted, the Board's jurisdiction shall be confined to review of the ruling or order of the Administrative Law Judge on the legal issue raised by the appeal, and shall not extend to any other issues.

ROCHESTER & PITTSBURGH COAL COMPANY

5 IBMA 51 Decided *July 31, 1975*

Appeal by Rochester & Pittsburgh Coal Company from a decision by Administrative Law Judge Franklin P. Michels upholding the validity of an imminent danger withdrawal order issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Imminent Danger: Proximate Peril

A proximate peril to life and limb constituting an *imminent* danger does not exist where the potential for a disaster is so remote and speculative that a reasonable man would estimate that such disaster would not occur prior to abatement if normal operations to extract coal continued.

APPEARANCES: W. Joseph Engler, Jr., Esq., for appellant, Rochester & Pittsburgh Coal Company; Richard V. Backley, Esq., Assistant Solicitor, Marcus P. McGraw, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Rochester & Pittsburgh Coal Company (appellant) appeals to the Board to overturn a decision in Docket No. PITT 74-234 by Administrative Law Judge Franklin P. Michels (Judge) upholding the

validity of an imminent danger order of withdrawal which had been issued pursuant to section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (the Act). 30 U.S.C. § 814(a) (1970). Appellant argues in substance that the Judge erred in ultimately finding that the accumulation of combustible materials which gave rise to the subject withdrawal order reasonably posed a risk of serious bodily harm or death through explosion or fire which probably would have occurred before such risk could be eliminated if normal operations to extract coal had continued. Having examined the record with care, we find, for the reasons set forth hereinafter, that the risk of an explosion or fire was too remote and speculative to have constituted an *imminent* danger within the meaning of the Act. 43 CFR 4.605. Accordingly, we reverse the decision below and vacate the subject withdrawal order.

Procedural and Factual Background

The withdrawal order in question, No. 2 LCW, was issued by a Mining Enforcement and Safety Administration (MESA) inspector on January 24, 1974 at appellant's Margaret No. 7 Mine. The order cited the following condition:

> Accumulations of float coal dust along the 11 Right belt conveyor for a distance of 3,000 feet * * *

The order was terminated nine hours subsequent to its issuance after the application of 20 tons of rock dust.

The present case was instituted by appellant on February 4, 1974 when it timely filed an application for review pursuant to section 105 (a) of the Act. 30 U.S.C. § 815(a) (1970). Appellant asserted in pertinent part that the condition cited in the subject withdrawal order could not have reasonably been expected to cause death or serious bodily harm before such condition could be abated.

MESA filed an answer in opposition on February 11, 1974. Three days later, on February 14, 1974, the United Mine Workers of America (UMWA), as representative of the miners at the subject mine, also filed an answer contending, as did MESA, that the challenged order was valid in all respects.

An evidentiary hearing before the Judge was held on April 4, 1974 at which time all parties were represented except the UMWA. Following conclusion of the hearing, all parties except the UMWA filed proposed findings of fact and conclusions of law. In addition, appellant filed a post-hearing brief.

By decision dated October 15, 1974, the Judge denied appellant's request that the subject withdrawal order be vacated and affirmed its validity.

On November 18, 1974, appellant filed its notice of appeal. Subsequently, timely briefs by appellant and MESA were filed with the Board and oral argument took place before the undersigned panel on June 16, 1975. The UMWA has not participated in this appeal.

Issue on Appeal

Whether the Administrative Law Judge erred in concluding that the subject withdrawal order was issued on the basis of a condition which at the time of issuance warranted a reasonable estimate or expectation that death or serious bodily injury would occur before elimination of the danger if normal operations to extract coal continued.

Discussion

[1] Appellant takes issue with one principal aspect of the decision below. It contends in substance that the Judge abused his fact finding discretion in weighing the inspector's expert opinion to the effect that the chance of an explosion or fire ocurring amounted to just a possibility. It also argues that the Judge erred in concluding that the subject danger was imminent on the basis of his finding, contrary to the inspector, "* * * that the chance of something going awry is more than a mere possibility."

The basic facts essential for a decision in this case are undisputed. The specific area of the mine covered by the subject withdrawal order was the No. 11 right belt line which spans a distance of approximately 3,200 feet. For most of its length, the entryway is approximately three and one-half feet high and is traversible only by lying flat in a prone position on the conveyor belt. Water runs through the entry for about 500 feet and there are other wet spots along the belt line. The sole mining activity occurring in this portion of the mine is the transporting of coal along the belt; no other operations associated with the extraction of coal take place in this area. There is no evidence of a history of methane releases or gas explosion in the subject mine.

Float coal dust consists of extremely fine particles of coal that are carried along by air current. The dust settles down and forms a layer on rib and floor surfaces. The depth of such a layer may be extremely small and is not readily measurable. The presence of such dust is ascertained by subjective and purely visual observation. Dry float coal dust is more readily ignitable than larger particles of coal. Moreover, it is so lightweight that it is easily disturbed and can explode, when in suspension in sufficient quantity and upon ignition.

The inspection, which led to the issuance of the subject withdrawal order, was conducted by MESA inspector Lester C. Walker. Mr. Walker was accompanied by Mr. Walter C. Balitski, his supervisor, as well as by Mr. William E. Edmonds, appellant's mine superintendent. The inspection party traveled 2,700 feet along the subject belt line lying flat on their stomachs, but were able to walk upright through the remaining 500 feet. The principal sources of illumination were headlamps worn by each person.

The inspector concluded that there were dangerous accumulations of float coal dust because the entry was "black," and at one point he raised some dust by kicking the

surface. He neither measured nor sampled the dust. (Tr. 19–25.)

Appellant established that there was a substantial amount of wetness and dampness throughout the entry. (Tr. 74, 135–6, 197–8.) It also showed that the "accumulation" lay considerably beneath the conveyor belt rollers. (Tr. 119, 225.)

The inspector had no knowledge of methane in the area or of any history of prior methane explosions in the subject mine. (Tr. 70.) The air in the subject entry was adequate and was directed toward the working sections. (Tr. 30.)

The potential sources of ignition were, according to the inspector, a 550 volt insulated feed line, electrical switches, open motors, and hot or stuck rollers in dust. The potential events which could cause the dry float coal dust to go into suspension were identified as rock falls or a break in the belt. The inspector's expert opinion of the potential for any of these events occurring was that they were merely possible. (Tr. 63–4.)

Contrary to the inspector's estimate, the Judge found that such potential was more than a mere possibility. Relying upon that basic finding, he ultimately concluded that there had been a reasonable expectation that death or injury would occur before abatement if coal extraction operations continued, and that the danger, therefore, had been "imminent."

In considering appellant's strenuous objection to the weight given the inspector's expert opinion, we are of course mindful of the test of imminent danger set forth in *Freeman Coal Mining Corp.*, 2 IBMA 197, 212, 80 I.D. 610, 1973–1974 OSHD par. 16,567 (1973), and approved by the United States Court of Appeals for the Seventh Circuit, 504 F. 2d 741, 745 (7th Cir. 1974), which is whether

> * * * a reasonable man would estimate that, if normal operations designed to extract coal in the disputed area should proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

Moreover, it is worth recalling that, with reference to the testimony of federal coal mine inspectors, we have said that although their opinions need not be taken to great value, they may be entitled to great weight if they are relevant and not discredited upon cross-examination or by other evidence. *Compare Freeman Coal Mining Corp., supra*, 2 IBMA at 212, *with North American Coal Corp.*, 3 IBMA 515, 520–1, n.1, 81 I.D. 772, 1974–1975 OSHD par. 19,159 (1974).

The implication of these previously stated views is clear. In applying the *Freeman* reasonable man test, it is error for a Judge to discount or ignore a credibly stated, relevant, expert opinion by a federal inspector who was a firsthand observer unless there is other persuasive evidence in the record which contradicts his opinion. This principle applies evenhandedly irrespec-

tive of whether the expert opinion in dispute supports the Government's position or, as in the case at hand, detracts from it.

With regard to the instant case, we note that, contrary to the inspector's opinion, the Judge found "* * * that the chance of something going awry is more than a mere possibility * * *." He apparently thought that such finding supported his ultimate conclusion that there had been a reasonable expectation of disaster at the time the subject withdrawal order was issued if coal extraction had continued during abatement.

When appraised by the standards drawn from our precedents we think the disputed finding and conclusion of the Judge are erroneous in two respects.

First, the Judge did not state any specific reason or point to any evidence to support his opinion that the potentiality for a disaster was greater than a mere possibility. As we have indicated in the past, a speculative potential for a remote possibility does not warrant the issuance of an imminent danger withdrawal order. *Compare Quarto Mining Co. and Nacco Mining Co.*, 3 IBMA 199, 81 I.D. 328, 1973–1974 OSHD par. 18,075 (1974) with *Old Ben Coal Corp.*, 3 IBMA 282, 81 I.D. 440, 1973–1974 OSHD par. 18,-299 (1974), *aff'd sub nom. Old Ben Corp.* v. *Interior Board of Mine Operations Appeals*, — F. 2d —, 1974–1975 OSHD par. 19,734, (7th Cir. June 13, 1975). The Judge's reliance on the inspector's testimony in all other respects, particularly where contradicted by appellant's evidence, clearly shows that he found Mr. Walker to be a credible witness. Moreover, the Judge completely ignored the significance of the testimony by Mr. Balitski, Inspector Walker's supervisor, who shared his subordinate's estimate of the potentiality for an explosion or fire. (Tr. 103, 115–6.)

Second, even if we agreed that the Judge was warranted in finding the potentiality to be more than a mere possibility, we still could not hold that such finding would support his ultimate conclusion of a reasonable expectation. In our view, even where the potential for the occurrence of an event is more than a mere possibility, it may still be too remote to constitute the kind of proximate peril discussed in *Freeman*, *supra*, that is to say, the type of disaster which a reasonable man would expect to occur at any moment. 2 IBMA at 212.

Accordingly, we are setting aside this finding of the Judge and must now determine whether the evidence of record and basic findings otherwise support the Judge's ultimate conclusion of *imminent* danger.

We find it significant that the sole mining activity in the area was the transport of coal along the belt which means that methane, a potential source of explosion, would have to have come from the working sections into the belt line area. The likelihood of such an event occurring was very remote inasmuch as

the air flow through the entry was *toward* the working faces. That negligible likelihood, when considered along with the lack of any history of methane releases (App. Exhibit No. 2) or gas explosions in the subject mine, supports a finding that the potential for a methane explosion was a bare possibility and did not rise to the level of a reasonable expectation. Therefore, any fire or dust explosion would have to have occurred in the absence of methane.

Since the evidence shows that the "accumulation" lay beneath the conveyor belt, ignition and a fire as a result of hot, stuck rollers was not a *present*, reasonable expectation at the time the instant withdrawal order was issued. *See Old Ben Coal Corp., supra.*[1] With respect to the potentiality of a dust explosion, we note that the float coal dust would have to have been suspended in air in sufficient quantities for a spark to cause such an explosion. The events which could have caused the dust to go into suspension were identified as a rock fall or belt break, but there is nothing in the record to show that the roof or ribs were unsound or that the condition of the belt was such that the likelihood of a fall or break was any more than the bare possibility estimated by the inspector and his supervisor. Likewise, in the face of the inspector's opinion, there is nothing *in the record* to support a finding that a *present* expectation of a spark occurring was reasonable at the time the subject order was issued, even if we assume a likelihood that the dust would have gone into suspension. (Tr. 23, 119, 225.) Finally, the record contains no expert opinion contrary to that of the inspector which would show that the coincidence of events requisite for a fire or explosion was reasonably likely to occur.[2] The inspector's opinion was that such a coincidence of events was only a possibility, and his view is buttressed by the showing of the wet, damp conditions along the belt line, and the accumulation of float coal dust lying considerably beneath the conveyor belt rollers.

In sum, we find, on the basis of the record considered as a whole, that the potentialities for an explosion or belt fire amounted only to possibilities. We conclude that, on the basis of such speculative potentialities, a reasonable man would have estimated at the time the subject order was issued that, if normal

[1] *See* also *Old Ben Coal Co.* v. *MESA*, VINC 74–6 (Rampton, A. L. J.) (1975).

[2] MESA relies on the testimony of Mr. John Nagy, an acknowledged and duly qualified expert on float coal dust. However, Mr. Nagy was never asked whether, assuming that the inspector testified truthfully and accurately as to the conditions he observed, it was his expert opinion that there was, at the time the subject order was issued, a reasonable likelihood that if normal operations to extract coal persisted during abatement it was at least just as probable as not that an explosion or fire would occur. Thus, his testimony lacks substantiality and probative value. *See* Goldstein, *Trial Technique* §§ 464–543 (1st ed. 1935). Moreover, a significant portion of his pertinent testimony contained vague hearsay piled upon hearsay which was never related to the facts of the case at hand. (Tr. 141–2.)

operations to extract coal persisted during abatement, it was less probable than not that the feared disaster would occur before elimination of the danger. *Compare Freeman Coal Mining Corp., supra*, with *Quarto Mining Co. and Nacco Mining Co., supra*. In the circumstances of this case, we hold that the ultimate finding of imminent danger by the Judge was erroneous and unsupported by the record.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision appealed from IS REVERSED and the subject order of withdrawal, No. 2 LCW, IS VACATED.

DAVID DOANE,
Administrative Judge.

WE CONCUR:

C. E. ROGERS, JR.,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

LECKIE SMOKELESS COAL COMPANY

5 IBMA 65

Decided August 7, 1975

Appeal by the Mining Enforcement and Safety Administration from an Initial Decision, dated March 7, 1975, by Administrative Law Judge George A. Koutras in Docket No. HOPE 74-2003-P assessing penalties for 12 violations and vacating notices of two violations of the Federal Coal Mine Health and Safety Act of 1969 alleged by MESA at No. 11 Mine, Rupert, Greenbrier County, West Virginia.

Modified.

1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Recording Examinations

Monthly examinations of circuit breakers and their auxiliary devices protecting high voltage circuits must be recorded monthly pursuant to 30 CFR 75.800-4 as read in conjunction with § 75.800-3 and § 75.1806.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and Stephen Kramer, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

This appeal by the Mining Enforcement and Safety Administration (hereinafter MESA) contests one of the two vacated notices. After a hearing, in which Leckie Smokeless Coal Company (Leckie) took no part, the Judge, pursuant to the provisions of 43 CFR 4.544, found that 12 of the violations charged had occurred, and after consideration of the statutory criteria set forth in section 109(a) of the Federal Coal Mine Health and Safety Act of 1969 [1] (hereinafter the Act), assessed penalties in the total amount of $1,475.

A timely Notice of Appeal and subsequent brief were filed by MESA. No reply brief was submitted by Leckie. The instant appeal is from the vacation by the Judge of Notice 9 FLD, November 13, 1973, which alleges a violation of 30 CFR 75.800-4. That regulation requires the operator to maintain a record of the results of tests and examinations which are

[1] 30 U.S.C. §§ 801-960 (1970).

required to be made under 30 CFR 75.800–3. The Judge held that § 75.800–4 does not require such recording to be made on a monthly basis but only that the results of the tests and examinations be maintained and recorded. MESA urges that the Board reverse this holding of the Judge.

Issue Presented

Whether the monthly examinations of circuit breakers as required by 30 CFR 75.800–3 must be recorded monthly in a book prescribed in 30 CFR 75.1806.

Discussion

The requirements of § 75.800–4 must be interpreted in light of 30 CFR 75.1806, which specifies the approved book in which the required records be kept, and in light of 30 CFR 75.800–3 requiring a monthly testing of circuit breakers.

30 CFR 75.800–3 states in applicable part that:

> (a) Circuit breakers and their auxiliary devices protecting underground high-voltage circuits *shall be tested* and examined at least once each month * * *. (Italics added.)

30 CFR 75.800–4 states that:

> The operator of any coal mine shall maintain a written record of *each* test, examination, repair, or adjustment of all circuit breakers protecting high voltage circuits which enter any underground area of the coal mine. *Such record shall be kept in a book approved by the Secretary.* (Italics added.)

30 CFR 75.1806 states that:

> The results of *monthly* examinations of high voltage circuit breakers on the surface required to be conducted under the provisions of §§ 75.800, 75.800–3, and *75.800–4*, shall be recorded in a book entitled "*Monthly* Examination of Surface High Voltage Circuit Breakers" (Mining Enforcement and Safety Administration Form 6–1493, Budget Bureau No. 42–RI589, March 1970). (Italics added.)

[1] It is clear that the aforequoted regulations provide that circuit breakers be examined monthly and that the results of such monthly examinations must be recorded. We concur in MESA's view that such record must be kept on the same basis as the requirement for examination, *i.e.*, on a monthly basis. Any other interpretation would render meaningless the requirement for recording. Furthermore, the approved book (Form 6–1493) supplied to the operator by MESA for the purpose of recording such examinations makes clear that the results of examinations of circuit breakers be recorded therein on a monthly basis.[2] It appears from the record that the required recordings in the book were not being made on a monthly basis. Therefore, we find Notice of Violation 9 FLD, November 13, 1973, to have been properly issued and the Judge's vacation of this Notice to be error. It is, therefore, set aside and the Notice reinstated.

The findings of the Judge with respect to history of previous violations, size of business, and ability to stay in business are adopted by this Board. The proposed findings, conclusions, and recommended penalty for the instant violation sub-

[2] The Board has taken official notice of MESA Form 6–1493 to the extent indicated. However, our conclusion herein is based upon our reading and interpretation of the regulations involved and would be the same even in the absence of such official notice.

mitted below by MESA are also adopted. We make the following findings with respect to the reinstated Notice of Violation:

Gravity:

Records of examinations are required to be kept to inform interested persons (including MESA) of existing and changing conditions; however, the likelihood of an injury from failure to maintain such records seems minimal. Based on these facts, we find that the violation was nonserious.

Negligence:

The operator was on notice of this requirement and knew or should have known of this failure to record since his signature is required on the approved examination books. Therefore, the violation was occasioned by the operator's lack of due care to comply with this mandatory safety standard. Consequently, we find that the violation resulted from the operator's negligence.

Good Faith:

We find that the operator demonstrated good faith in compliance.

We adopt the penalty recommended by MESA for this violation in the amount of $58.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in Docket No. HOPE 74-2003-P IS MODIFIED by reinstating Notice 9 FLD, November 13, 1973, and assessing a penalty of $58 therefor, and that the total assessment of $1,533 SHALL BE PAID by the Leckie Smokeless Coal Company within 30 days of this Order.

DAVID DOANE,
Acting Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

WALLACE S. BINGHAM

21 IBLA 266

Decided *August 11, 1975*

Appeal from the decision of Administrative Law Judge Robert W. Mesch canceling Desert Land Entry Idaho 186.

Reversed.

1. Desert Land Entry: Generally—Desert Land Entry: Applicants

Excepting in of Nevada, no person shall be entitled to make entry of desert lands unless he is a resident of the state in which the land is located. An applicant's conditional, future-oriented intention to reside in the state is insufficient to qualify.

2. Desert Land Entry: Assignment—Desert Land Entry: Cancellation

Where an allowed desert land entry was assigned to a qualified individual and the assignment was duly approved, a subsequent determination that the entry was illegal from its inception because the original entryman was not qualified will not afford a basis for cancellation of the entry where it is established that the assignee was unaware of his assignor's lack of qualifications and proceeded in good faith to develop the entry.

3. Desert Land Entry: Distribution System

Neither the law nor the regulations prohibit the use of a portable aluminum pipe irrigation system in the reclamation of lands in a desert entry, nor is there any affirmative requirement that the irrigation system or specific components thereof be permanently installed on the entry.

4. Regulations: Generally—Regulations: Interpretation

A regulation should be so clear that there is no basis for a patent applicant's noncompliance with it before it may be so interpreted as to deprive him of a statutory right to receive title to his desert land entry. If there is doubt as to the meaning and intent of a regulation, such doubt should be resolved favorably to the applicant.

APPEARANCES: Richard H. Greener, Esq., Kidwell and Greener, Boise, Idaho, for the appellant; Riley C. Nichols, Esq., Office of the Regional Solicitor, Department of the Interior, for the appellee.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

In 1973 the Idaho State Office of the Bureau of Land Management (BLM) initiated contest proceedings seeking the cancellation of a desert land entry designated Idaho 186. The contest complaint charged, in paragraph V, that the entry should be canceled because:

(a) An irrigation system sufficient for the proper irrigation of all the irrigable lands in the entry has not been installed on the entry.

(b) The entry has not been developed substantially in accordance with the plans filed with the application for entry.

(c) At the time she applied for entry, the contestee's assignor did not intend in good faith to reclaim the land for her own use and benefit.

(d) At the time the entry was allowed, the contestee's assignor did not intend in good faith to reclaim the land for her own use and benefit.

The hearing was conducted on June 28, 1973, at Shoshone, Idaho, by Administrative Law Judge Dent D. Dalby.[1] After receipt of the evidence on the four original charges, the contestant withdrew charge V (b) of the complaint, as the evidence indicated only a slight deviation from the original plan of irrigation, for which there appeared to be good reason[2] (Tr. 254). However, during the course of the hearing a question arose as to the residence qualifications of the original entrywoman, Mrs. Maribah Winsor, whereupon Judge Dalby allowed the complaint to be amended to add the following charge:

(e) The contestee's assignor was not a resident of the State of Idaho at the time she applied for entry, or at the time the entry was allowed. (Tr. 232-235.)

The hearing was continued to provide the contestee an oppor-

[1] Judge Dalby retired from Government service on August 3, 1974. The case was then assigned to Administrative Law Judge Robert W. Mesch for initial decision. See 5 U.S.C. § 554(d) (1970).

[2] The elimination of this charge was not noted in Judge Mesch's decision.

tunity to meet the allegation added to the complaint during the hearing. The parties subsequently agreed that a further hearing was not necessary and in lieu thereof they submitted, as a joint exhibit, a deposition of the contestee's assignor taken on May 21, 1974, in Boise, Idaho.

[1] After studying the record and the briefs submitted by respective counsel, Judge Mesch found no need to consider any issue other than the following:

1. Was the original entrywoman, the contestee's assignor, a resident citizen of the State of Idaho at the time she applied for entry or at the time the entry was allowed and, if not, was the entry illegal in its inception?

2. If the entry was illegal in its inception, is the contestant estopped, as alleged in the contestee's brief, "from denying the issuance of a patent for the entry to Mr. Bingham by virtue of his status as a bona fide purchaser?"

In 1891, the Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. § 321 *et seq.* (1970), was amended by adding the following:

> Excepting in the State of Nevada, no person shall be entitled to make entry of desert lands unless he be a resident citizen of the State or Territory in which the land sought to be entered is located.

(Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. § 325 (1970)).

The entry of Idaho land was applied for and allowed to Mrs. Maribah Winsor, whom Judge Mesch found to be a resident of the State of Utah. The entrywoman's daughter and son-in-law were residents of Idaho, and each of them had previously entered lands pursuant to the Desert Land Entry Act and received patents to their respective entries, thereby disqualifying them from making any further entries under the Act. Mrs. Winsor had established a regular practice of some 18 years' duration of spending a substantial portion of the late summer and early fall visiting her daughter's family in Idaho, where she assisted them by performing various services around the farm. This involved frequent commuting between her home in Utah and her daughter's home in Idaho. The services she performed were not regarded by the families as employment, although her son-in-law, Fred Stewart, testified that he did cover the cost of her transportation back and forth, by automobile, train and bus. The land at issue was adjacent to land privately owned by Stewart, who testified that he assisted his mother-in-law with the filing of the application, financial negotiations and improvement of the entry in an effort to get the Winsors back into farming, "to get Father Winsor up there [from Utah] to pretty well supervise this whole operation," and to help to repay Mrs. Winsor for her past efforts.

Nevertheless, about a year after the entry was allowed arrangements were made by Stewart to sell the entry and the adjacent private land of Stewart to the appellant, Wallace Bingham. The sale was consum-

mated and Bingham then proceeded to improve and to farm the entry.

It was Mrs. Winsor's testimony that at the time she applied for the entry and at the time it was allowed, she intended to be a resident of Idaho. However, she qualified this intention, and made it prospective, by conditioning her establishment of residency in Idaho on success in obtaining the entry and, presumably, the requisite financing, stating, "if we knew that it was to be ours and if things had gone right for us." (Tr. 66.) There is absolutely no evidence that Mrs. Winsor has ever been a resident of Idaho other than her own conditional, future-oriented statement that she intended to be one. To the contrary, all of the considerable evidence which was adduced on this issue and recounted in the decision below indicates that at all times material to this inquiry she was in fact a resident of Utah, and Judge Mesch so found.

On the basis of his finding that the entry was thus illegal in its inception, Judge Mesch, by his decision of January 8, 1975, canceled the entry without reference to any of the other charges in the contest complaint. Wallace Bingham appeals from that decision.

We concur with the finding that Mrs. Winsor was not qualified to make the entry by reason of her nonresidence, and that the entry was illegal from its inception.

[2] However, we cannot agree that the lack of the assignor's qualification should result in the cancellation of the entry in the possession of a bona fide assignee who, apparently, is qualified to hold the entry.

By taking an assignment of a desert-land entry, the assignee is substituted for the original entryman, and his rights under the entry are the same as they would have been had he made the entry in the first instance. By assignment the entry becomes his entry, and the date thereof is when it was first made. *Albert A. Bandy*, 41 L.D. 82 (1912).

A number of Departmental decisions have held that where an assignee who is qualified under the desert-land law receives his assigned entry from an intermediate (mesne) assignor who was not so qualified, the lack of qualification of the assignor does not invalidate the entry, notwithstanding that section 2 of the Act of March 28, 1908, *as amended*, 43 U.S.C. § 324 (1970), declares that assignments to disqualified persons and to associations shall not be allowed or recognized. *Amos N. S. Kelly*, 50 L.D. 268 (1924); *Ruple* v. *DeJournette* (On Rehearing), 50 L.D. 139 (1923); *Augusta Ernst*, 42 L.D. 90 (1913). The only distinction between these cases of disqualified assignors making assignments to qualified assignees and the circumstances of the case at bar is that the foregoing cases all involved mesne assignees, whereas in the instant case the disqualified assignor was the original entrywoman. However, we fail to see how this distinction requires a different result, particularly in light

of the discussion in *Augusta Ernst*, *supra*, at 92:

> A desert land entryman is permitted to assign his entry, and if such transferred or assigned entry be found by the Government in the hands of a person qualified to hold, the title should not be questioned simply because an intermediate transferee was not qualified to hold. The Government would not knowingly approve a transfer which would fix title in one not qualified to take, but where one qualified to hold is asking recognition of a transfer of an apparently valid entry, no reason is seen, in the light of the principles above illustrated, why such transfer should not be recognized and approved, even though the prior holder was disqualified.

In this case the BLM allowed the entry to Mrs. Winsor without knowing that she was not qualified, and subsequently approved the assignment to Bingham, whose qualification has not been challenged.

A further illustration that an entryman cannot influence the status of the entry after it has been assigned is found in *Sharp* v. *Harvey*, 16 L.D. 166 (1892). That case held that where an entryman assigned his desert-land entry to another by an assignment which was recognized under Departmental regulations, the right of the assignee could not be defeated by the subsequent relinquishment of the entry by the original entryman.

Of course, our conclusion that the assignee holds the entry in his own right and is unaffected by the disqualification of his assignor is dependent upon a finding that the assignee took the assignment in good faith, without knowledge of any defect in the entry or in his assignor's right thereto. That problem does not arise in this instance, as the contestant stipulated to Bingham's good faith at the hearing (Tr. 45):[2]

> MR. GREENER: Prior to my cross examination, Your Honor, I believe that Counsel will stipulate with the contestee that at this point in time the Government is not contesting in any way the good faith of Mr. Bingham.
>
> MR. NICHOLS: The Government so stipulates, Your Honor.
>
> JUDGE DALBY: All right, it is so stipulated.

Appellant cites *United States* v. *Detroit Timber and Lumber Co.*, 200 U.S. 321 (1906), for the proposition that the Government is estopped to deny the title of a bona fide purchaser. Judge Mesch held that case to be inapplicable, in that there patents had been issued by the United States prior to the commencement of the proceedings. While we are of the opinion that the case at bar is not one which presents an example of estoppel against the United States, we consider the Court's opinion in *Detroit Timber and Lumber Co.* to be relevant:

> * * * The equity is founded on the rightful conduct of the purchaser and not on the wrongful conduct of the entrymen. It upholds the purchaser in his honest purchase notwithstanding the wrongful character of the entries. This is akin to the ordinary rule in respect to a *bona fide* purchaser. Equity sustains the title

[2] Both Mrs. Winsor and Bingham testified that they had never met prior to the hearing, Stewart having acted as intermediary in effecting the assignment.

in spite of the fact that his grantor may have wrongfully obtained it, and upholds it because of his rightful conduct. (Italics supplied.)

200 U.S. at 336.

Immediately following the quoted passage the Court examined and rejected the argument of counsel that a purchaser from an entryman cannot be regarded as a bona fide purchaser unless he becomes such after the Government, by issuing a patent, has parted with the legal title.

Accordingly, we hold that where an allowed desert land entry was assigned to a qualified individual and the assignment was duly approved, a subsequent determination that the entry was illegal from its inception because the original entryman was not qualified will not afford a basis for cancellation of the entry where it is established that the assignee was unaware of his assignor's lack of qualification and has proceeded in good faith to develop the entry.

[3] The only remaining charge which concerns the appellant's entitlement to receive a patent is V (a), to the effect that he has not installed on the entry an irrigation system sufficient for the proper irrigation of all of the irrigable land in the entry.

The charge, as so expressed, is an appropriate one. However, it developed at the hearing that the contestant is primarily concerned with the fact that Bingham has reclaimed and irrigated the entry lands by using the same *portable* aluminum mainlines and laterals which he also uses to irrigate his adjacent private lands. It is the Government's contention that a portable irrigation system, no matter how efficient, will not satisfy the requirements for patent, but that, rather, the mainlines of the irrigation system must be permanently installed on the entry (Tr. 194).

The Department has long recognized that the Desert Land Act does not prescribe a particular mode of irrigation and by Departmental rulings it early on required the method of irrigation to be such as would evince the good faith of the claimant and render the land suitable for agriculture. *See Vibrans* v. *Langtree*, 9 L.D. 419 (1889), a case in which the entryman constructed no ditches or canals for the conveyance of water onto the entry, but instead flooded most of the land during about three months each year by building a dam across a river which ran through the property, thereby providing ample moisture to reclaim the land and achieve good agricultural success. The Department held that this mode of irrigation was satisfactory in view of the claimant's demonstration of his good faith.

The very first reported Departmental decision concerning desert land entries dealt with this issue, holding that there must be a demonstration of a good faith endeavor to irrigate the land, and that the method employed must be such that a sufficient quantity of water is conveyed and distributed on the land to prepare it for cultivation. *Wallace* v. *Boyce*, 1 L.D. 26 (1882). The

proof was held to be satisfactory where it showed the claimant to be the owner of a quantity of water sufficient to irrigate the land for agricultural purposes, and that he conveyed such water on the land so that it could be used in irrigating the crop. *Secretary's Letter to Commissioner*, 3 L.D. 385 (1885). The manner of irrigation and distribution of the water is indicative of the good faith of the entryman. *George Ramsey*, 5 L.D. 120 (1886); *Wallace* v. *Boyce*, *supra*.

The first reference to "permanence" which we have discovered is contained in *Orin P. McDonald*, 13 L.D. 30 (1891), in which the following points of inquiry were identified as determinative of the sufficiency of a final proof on the issue of reclamation:

> * * * 1st, Has water been brought upon the land? 2d, Is it of sufficient quantity to irrigate and reclaim the land, rendering it capable of producing agricultural products? 3d, Is the supply permanent and controlled by the entryman and the means of distribution sufficient?

13 L.D. at 31.

It will be noted that the concern of the Secretary was that the *water supply* and the entryman's *control* of it be permanent, not that the *irrigation works* be permanent. This view comports with the requirement in the current regulation, 43 CFR 2521.2(d), which refers to the entryman's showing that he has "a right to the permanent use of sufficient water to irrigate * * *."

Section 7 of the Act of March 3, 1891, 26 Stat. 1096, 43 U.S.C. § 329 (1970), speaks of minimum expenditures for "* * * irrigation, reclamation, and cultivation of the land by means of main canals and branch ditches, *and in permanent improvements upon the land* and in purchase of water rights * * *." We cannot construe this to mean that the irrigation system must be permanent; the reference to permanent improvements could just as easily refer to fences, buildings, roads and physical land improvements, such as clearing, grading, etc. *See Instructions*, 50 L.D. 443, 455 (1924).

In the appeal of *United States* v. *Swallow*, A–30000 (April 8, 1965), it was noted that at the hearing, "there was a confusion of the issues to be resolved * * * *e.g.*, the arguments over whether the main pipeline had to be permanently attached to the land * * *." This merely suggests that the Department regarded the question as an appropriate one for argument. The case was remanded for rehearing and was the subject of a second appeal to the Department, *United States* v. *Swallow*, 74 I.D. 1 (1967), but it does not appear that this precise question was resolved in that case.

The language of the decision in *Clinton C. Douglass, Jr.*, A–28961 (September 20, 1962), would certainly suggest that a portable system would be acceptable if it were of sufficient capacity, extent and condition to do an adequate job of irrigation. That decision states:

> Since the appellant planned to utilize a portable system of sprinkler irrigation

pipes and fixtures, it was, of course, unnecessary that these pipes and fixtures be affixed to the land in a permanent fashion. However, it was necessary that he have sufficient pipe and fixtures actually on the land and set up in a manner which would permit him to demonstrate a successful irrigation of a sufficient portion of the entry which would point to the conclusion that, by merely moving the equipment, all other portions of the entry, comprising the entire irrigable acreage, could be successfully irrigated.

The decision affirmed the partial rejection of Douglass' final proof and canceled part of his entry *not* because he used a portable system, but because it was inadequate to serve the entire entry, and because he had an insufficient water right.

The contestant argues that permanent *main* conduits are required by 43 CFR 2521.6(f). That regulation reads, in pertinent part, as follows:

> * * * The final proof must clearly show that all of the permanent main and lateral ditches, canals, conduits, and other means to conduct water necessary for the irrigation of all the irrigable land in the entry have been constructed so that water can be actually applied to the land as soon as it is ready for cultivation. * * *

We are unable to translate this employment of the adjective "permanent" into a mandatory requirement that all desert land irrigation systems must be permanently affixed to the land. Were we able to do so, however, we could not limit the requirement only to the *main* lines, as contestant asserts is intended, but we would be obliged to hold that the adjective refers to laterals, conduits and other means to conduct water as well, so that the entire system would have to be permanently installed. The Department has never required this. *See United States* v. *Swallow*, 74 I.D. 1, 11 (1967); *Clinton C. Douglass, Jr., supra.*

[4, 3] The use of the word "permanent" in the regulation must be considered ambiguous at best if it is to be construed as imposing a requirement not articulated elsewhere in the law or the regulations. Regulations should be so clear that there is no basis for an applicant's noncompliance with them before they are interpreted so as to deprive him of a statutory right. *Louis Alford*, 4 IBLA 277 (1972); *Mary I. Arata*, 4 IBLA 201, 78 I.D. 397 (1971). If there is doubt as to the meaning and intent of a regulation, such doubt should be resolved favorably to the applicant. *Mary I. Arata, supra; A. M. Shaffer*, 73 I.D. 293 (1966); *Madge V. Rodda*, 70 I.D. 481 (1963); *William S. Kilroy*, 70 I.D. 520 (1963); *Jack V. Walker*, A–29402 (July 22, 1963). Had it been the intention of the Secretary to impose a mandatory requirement that irrigation systems, or specific components thereof, be permanently installed on the entry, he could easily have done so by promulgating an explicit regulation to that effect. This has not been done.

Testimony elicited at the hearing suggests that there may well be good reason for not prohibiting the use of portable irrigation systems. Three witnesses testified concerning

the advantages of a portable system over a permanent one.[4] Among these are:

(1) Where a line is permanently installed it must be buried at least 2½ feet below the surface in order to prevent it from being damaged by equipment and to allow mechanical cultivating and harvesting. Where the field is rocky the cost of burying the line to the proper depth, including blasting, can be excessive (Tr. 262). Crops along a permanent line leave "a tremendous strip" on both sides, which must be avoided by tractors and cultivators and which must be worked by a hired "hand crew to come in and hoe these potatoes" (Tr. 263); but portable line can be picked up and set off in a pile to allow the machines to work (Tr. 263, 282).

(2) Maintenance problems are more difficult to handle on buried permanent lines. With a hot sun there will be "a tremendous amount of fluctuation * * * and you have a terrible lot of trouble with these risers that come from the ground up to where this valve [to a lateral line] fits in, breaking off" (Tr. 274). Permanent steel lines will eventually rust and have to be replaced, and careless workers damage a lot of a permanent system by trying to work equipment too close to it (Tr. 278, 279). Portable pipe sections can easily be removed for repair and replaced (Tr. 286). Moreover, portable pipe is not damaged as often; "You don't get near the busting—you don't bust these pipes, portable. * * * I never hardly ever replace them" (Tr. 282).

(3) A portable system requires a much lower initial capital outlay at a time when the farm developer's other costs are very high. With proper diversification of crops a smaller portable system can be moved as needed to serve a large area. Moving pipe involves additional labor, but it saves on investment costs (Tr. 268, 274, 275, 277, 280, 281).

The concern of the contestant and the Bureau employees who testified appears to be that unless the system is permanently installed, the entryman might remove it after obtaining patent, and discontinue farming the land, perhaps even using the same system to qualify another entry for patent (Tr. 197–198). Although there was no evidence adduced to indicate that the entryman intended any such thing, the Bureau's Realty Specialist testified, "You see, the potential exists * * *" (Tr. 198).

The record clearly establishes that nearly all the land in the 261 acre entry had been brought under cultivation, and that the water supply from four wells on appellant's adjacent private land is adequate to irrigate both the private land and the entry. Moreover, all the witnesses,

[4] Fred Stewart, a farmer of 35 years' experience; James H. Westfall, with 30 years' experience, Grant L. Butler, 22 years' farming experience. All are currently farming in the vicinity and all have made extensive use of portable irrigation systems. The recitation of the advantages of such a system is a condensation of their several testimonies.

including the contestant's,[5] agreed that the portable irrigation system is of sufficient size to irrigate both the entry and the adjacent private lands, and although the system is not capable of watering all of the lands simultaneously, as would be necessary if they were all planted with the same crop, in the words of James Westfall, "I don't think anybody would plant that way" (Tr. 287).

It is quite apparent that the contestant's objection to a portable system is not based (in this case) on a finding that it is inadequate for the proper irrigation of the entry as well as the adjacent private land of the entryman. *Cf. Clinton C. Douglass, Jr., supra.* Rather, the contestant is demanding the installation of a more extensive, permanently installed system as a demonstration of the entryman's good faith, not only in this case, but as a general requirement which all desert land entrymen must meet.

We find this position to be untenable. If there were other evidence sufficient to raise serious doubt that the entryman's efforts constituted a good faith endeavor to reclaim the land for the purpose of the Act, then his use of a portable system might be considered contributive to the overall evidentiary picture. But where, as here, there is nothing to suggest that the entryman has any other motive than to reclaim and farm the land for his own benefit, his use of a portable irrigation system is of no significance.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

EDWARD W. STUEBING,
Administrative Judge.

WE CONCUR:

NEWTON FRISHBERG,
Chief Administrative Judge.

MARTIN RITVO,
Administrative Judge.

[5] The contestant's chief witness, Realty Specialist Donald Runberg, testified that if the entry was patented the appellant would not have to buy any more pipe to farm the total area of the entry and the adjacent private land, assuming that he planned his farming operation so that he did not have to irrigate too much at once (Tr. 204, 205).

C. J. IVERSON

21 IBLA 312

Decided *August 14, 1975*

Appeal from a decision by the Montana State Office, Bureau of Land Management, holding oil and gas lease M-24227 to have terminated for failure to pay rental timely.

Affirmed.

1. Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Termination—Secretary of the Interior

Before relief may be granted to the lessee of a terminated oil and gas lease, he must comply with the prerequisites set forth in 30 U.S.C. § 188 (1970). The Secretary has no authority to waive such statutory prerequisites.

2. Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Termination

Reliance upon receipt of a courtesy notice can neither prevent the lease from terminating by operation of law nor serve to justify a failure to pay the lease rental timely.

3. Federal Employees and Officers: Authority To Bind Government—Oil and Gas Leases: Termination

Advice or information received over the telephone from personnel of the Bureau of Land Management does not constitute a "bill or decision rendered by" the Department under 30 U.S.C. § 188(b) (1970).

4. Oil and Gas Leases: Termination

Only when a lessee has made a deficient rental payment on or before the anniversary date of an oil and gas lease will a Notice of Deficiency be sent. If no payment at all is made, the lease will not qualify for consideration under the exceptions to automatic termination set forth in 30 U.S.C. § 188(b) (1970).

5. Oil and Gas Leases: Reinstatement

The Secretary has no authority to reinstate a terminated oil and gas lease unless the rental payment is tendered within twenty days of the due date. Such authority also does not exist if a valid oil and gas lease has been issued covering any of the lands in the terminated lease.

6. Oil and Gas Leases: Reinstatement—Oil and Gas Leases: Termination

A Notice of Termination is sent to the lessee of a terminated oil and gas lease only if he has tendered payment of the rental within twenty days after the anniversary date.

7. Oil and Gas Leases: Communitization Agreements

In order for a communitization agreement to qualify a lease as containing a "well capable of producing oil or gas" within the meaning of 30 U.S.C. § 188(b) (1970) and thus not subject to rental requirements, the agreement must be approved by the Secretary of the Interior.

APPEARANCES: Richard L. Beatty, Esq., of Shelby, Montana, for appellant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

C. J. Iverson appeals from the February 20, 1975, decision of the Montana State Office, Bureau of Land Management (BLM), upholding the automatic termination by operation of law of oil and gas lease M-24227 for failure to pay rental due on or before the anniversary date, April 1, 1974. Events leading up to appellant's failure to pay the rental are somewhat involved. We will, therefore, briefly describe the background of this appeal before discussing the merits of appellant's arguments.

Lease M-24227 covered certain lands in sections 23, 24 and 31, T. 32 N., R. 14 E., M.P.M. It was created in January 1973 out of oil and gas lease M-6113-A. At that time, certain lands in M-6113-A were unitized and the remaining lands were placed under a new lease, M-24227. The anniversary date of both leases remained April 1. Prior

to the 1973 anniversary date, appellant received conflicting notices regarding rental due for M–6113–A. He telephoned the BLM Montana State Office and was advised to call the U.S. Geological Survey (USGS) office in Casper, Wyoming. The USGS office advised appellant not to pay the rental for M–6113–A because it was part of a unit agreement and, therefore, only minimum royalty was due. Appellant followed this advice, which later proved to be correct.

In October 1973, appellant filed by certified mail a communitization agreement for section 23 with USGS for its approval.[1] Appellant owned, or partially owned, a producing gas well on non-federal land in section 23. This proposed communitization agreement apparently was lost by USGS and thus it was never approved.[2] Appellant also owned, or partially owned, a producing gas well on non-federal land in section 24. No communitization agreement was filed for this section prior to April 1, 1974. Meanwhile, a dry hole had been drilled on section 31, and appellant states that he had decided to drop the section 31 acreage from lease M–24227.

By affidavit, appellant states that he received no courtesy notice from BLM with regard to rental due on April 1, 1974, for lease M–24227. He further states that he telephoned the BLM State Office and was informed "that since the well in Section 23 had been commercially producing prior to the 1973 rental payment, he would have a refund coming or a credit balance for overpayment in that particular lease account when it was transferred to the USGS, and that the non-payment of the 1974 rental would drop the acreage in Section 31." He adds that he relied on this advice, as he relied upon the USGS advice the previous year, and did not submit any rental payment for lease M–24227 prior to the 1974 anniversary date.[3]

As no rental was paid on or before April 1, 1974, the BLM State Office noted that lease M–24227 automatically terminated under 30 U.S.C. § 188(b) (1970). Appellant states he received neither a notice of this termination nor a notice that his rental payment was "deficient." In September 1974, the lands in sec. 31 which were formerly covered by lease M–24227 were announced open for simultaneous filings and subsequently awarded to Dorothy D. Rupe of Los Angeles (M–30377). Appellant did not discover that

[1] By order dated February 19, 1970, the Oil and Gas Conservation Commission of the State of Montana limited the development of gas fields to one well per 640 acres. Sections 23 and 24 were included within this order.

[2] By affidavit dated January 10, 1975, the Area Oil and Gas Supervisor, USGS, Casper, Wyoming, acknowledged that a certified mail return receipt, which appellant states was attached to the proposed communitization agreement, was signed by a USGS employee in Casper, who is now deceased. The Area Supervisor further states that the contents of the package thus accepted cannot be located.

[3] We note that to drop specific acreage from an oil and gas lease, a lessee must file a relinquishment describing the acreage in the proper office as set forth in 43 CFR 3108.1. Nonpayment of rental, or partial nonpayment, alone will not accomplish this. *D. Miller*, 65 I.D. 281 (1958); *Cf. Charles E. Boardman*, A–27327 (June 6, 1956).

lease M-24227 had terminated until November 1974. On January 15, 1975, he filed a protest of the termination and submitted a check to BLM for the rental due April 1, 1974.

Appellant contends that either his lease did not terminate because his failure to pay the rental timely falls within an exception to termination set forth in 30 U.S.C. § 188 (b) (1970), or he is entitled to reinstatement of the lease under 30 U.S.C. § 188(c) (1970). The basis of both contentions is, in essence, that appellant's failure to pay his rental timely was a direct result of erroneous information from BLM and that BLM compounded this error by failing to notify appellant of the "deficiency" or of the termination. The BLM State Office decision on the protest stated that appellant's case did not fall within the provisions of 30 U.S.C. § 188 (b) or (c) (1970) and, therefore, must be rejected. Appellant argues that the BLM decision was an unnecessarily inflexible application of the law and that the Department has been granted by Congress sufficient discretion to rule in his favor. We cannot agree with appellant and must affirm the BLM decision.

[1] The extent of the discretion granted to the Secretary of the Interior by sec. 31 of the Mineral Leasing Act, 30 U.S.C. § 188 (1970), is overstated by appellant. The legislative history of the 1970 amendments to that section states:

> The purpose of S. 1193 is to confer *limited* authority on the Secretary of the Interior to prevent the automatic termination of certain oil and gas leases on Federal lands and to permit the reinstatement of terminated leases under certain conditions. * * * (Italics added.)

H. REP. NO. 91-1005, 91st Cong., 2d Sess. (April 14, 1970), 1970 U.S. CODE CONG. & ADM. NEWS 3002. Before relief may be granted under the 1970 amendments to sec. 31 of the Mineral Leasing Act, the statutory prerequisites must be met. *See e.g., William C. Morgan*, 13 IBLA 60, 62 (1973); *Louis Samuel*, 8 IBLA 268, 271 (1972). The Secretary has no authority to waive such statutory prerequisites.[4] We must, therefore, determine whether appellant has in fact complied with the necessary prerequisites.

[2, 3] The exception to automatic termination in 30 U.S.C. § 188(b) (1970), upon which appellant relies, states:

> * * * *Provided*, That if the rental payment due under a lease is paid on or before the anniversary date but * * * (2) the payment was * * * made in accordance with a bill or decision which has been rendered by him [the Secretary] and such figure, bill, or decision is found to be in error resulting in a deficiency,

[4] In his appeal, appellant also argues that the words "shall automatically terminate by operation of law" in 43 CFR 3108.2-1(b) are not necessarily mandatory. He compares the word "shall" with decisions which construed the word "must" in 43 CFR 3106.1-3 as not mandatory. We note that 43 CFR 3108.2-1(a) is taken directly from 30 U.S.C. § 188(b) (1970), whereas 43 CFR 3106.1-3 is "imposed by the Department for administrative convenience" and for the protection of third parties. *Newton Oil Co.*, A-30774 (Sept. 29, 1967). However, the Department interprets its own administrative regulations, it must comply with clear statutory requirements.

such lease shall not automatically terminate * * *.

The statute plainly requires that part of the rental payment be "paid on or before the anniversary date" in order for this exception to take effect. However, appellant argues that he received no courtesy notice and that he acted in reliance on advice received from BLM personnel over the telephone. He concludes that these circumstances fall within the "plain language and meaning of the act and the regulations."

We cannot agree. This Board has consistently held that reliance upon receipt of a courtesy notice "can neither prevent the lease from termination by operation of law nor serve to justify a failure to timely pay the lease rental." *Louis J. Patla*, 10 IBLA 127, 128 (1973); *Jimmy V. Bowling*, 20 IBLA 146 (1975); *cf. Joseph E. Steger*, 20 IBLA 206 (1975). Further, we cannot equate a telephone conversation between a lessee and an unidentified person in a BLM office to a "bill or decision rendered by" the Department. The mere fact that appellant relied successfully upon advice received over the telephone from USGS the previous year does not validate this procedure.[5]

[4] Appellant also argues that he has never received a Notice of Deficiency as required by 43 CFR 3108.2-1(b). BLM cannot be expected to interpret the absence of any rental payment as a deficiency. Both 30 U.S.C. § 188(b) (1970) and 43 CFR 3108.2-1(b) use the same language: "if the rental payment due under a lease is *paid* on or before the anniversary date" (Italics added). Only when this occurs will a notice be sent to the lessee that his payment was deficient. Since appellant did not make such a payment he does not qualify for consideration under the exceptions to automatic termination set forth in sec. 188(b), *supra*.

[5] Appellant has argued in the alternative that his lease should be reinstated under 30 U.S.C. § 188(c) (1970). That statute reads in pertinent part:

> Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, * * * the Secretary may reinstate the lease if—
>
> (1) a petition for reinstatement, together with the required rental, * * * is filed with the Secretary; and
>
> (2) no valid lease has been issued affecting any of the lands covered by the terminated lease prior to the filing of said petition. * * *

We have consistently held that the Secretary has no authority to reinstate a terminated lease unless the rental payment has been tendered within twenty days of the due date. *E.g., Aaron* v. *Barson*, 18 IBLA 156 (1974). This prerequisite was not met here. Moreover, oil and gas lease M-30377 has been issued for part of the lands formerly covered by appellant's terminated lease. Appellant's offer to relinquish the land contained in M-30377 will not cure

[5] The alleged telephone conversation in 1974 is discussed further, *infra*.

the statutory prohibition against reinstatement where a lease has been issued affecting any of the lands in the terminated lease.

[6] However, appellant argues that both his failure to tender payment within twenty days and the issuance of lease M–30377 are a direct result of the failure by BLM to send him a Notice of Termination. He further argues that this failure was in violation of 43 CFR 3108.2–1(c)(1). In this argument, appellant misconstrues the purpose of a Notice of Termination. The Notice of Termination is intended to toll the 15-day period for submission of a petition for reinstatement. Such a Notice is sent *only* if the lessee has tendered payment of the rental within twenty days after the anniversary date. *Amoco Production Co.*, 16 IBLA 215, 219 (1974).

[7] Appellant further argues that in not paying the rental he acted in reliance on the advice he received over the telephone from BLM. This Board is not prepared to accept appellant's summary of a telephone conversation with an unidentified BLM employee. We do not know what facts were presented by appellant during the conversation nor in what context the advice was given. Moreover, 30 U.S.C. § 188(b) (1970) clearly states that a lease "on which there is no well capable of producing oil or gas in paying quantities" will automatically terminate by operation of law if the rental is not paid on or before the anniversary date. In order for a communitization agreement to qualify a lease as containing a "well capable of producing oil or gas," and thus not subject to rental requirements, the agreement must be approved by the Secretary of the Interior. 43 CFR 3105.2; *see Harry D. Owen*, 13 IBLA 33 (1973). That USGS misplaced appellant's communitization agreement is irrelevant. The fact remains that appellant did not have an approved agreement for sec. 23 and had not even filed an agreement for sec. 24.

Inasmuch as appellant has failed to comply with the statutory prerequisites as described above, we are without authority to grant him either form of requested relief from the termination of his lease. *William C. Morgan*, *supra*. Appellant has argued that it would be in the public interest to grant him relief because production royalties due the United States would otherwise be lost. A similar argument was made in *Cayman Corporation*, 8 IBLA 248 (1972). In a concurrence to that decision it was stated:

> If appellant's analysis of the situation is accurate, and it seems to be, the public interest has indeed suffered by the termination of the leases and the failure to offer the lands for lease again, this time by competitive sale. The remedy offered seems a feasible method of recouping the loss. Nonetheless, the leases having terminated, there is no authority for reviving them. * * *

Cayman Corporation, *supra* at 253–254 (Concurring Opinion). This rationale applies here.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of

the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

MARTIN RITVO,
Administrative Judge.

EASTERN ASSOCIATED COAL CORPORATION

5 IBMA 74

Decided *August 15, 1975*

Appeal by Eastern Associated Coal Corporation from an order by Administrative Law Judge George A. Koutras in Docket No. HOPE 75-699 dismissing an application for review of orders issued pursuant to sec. 103 of the Federal Coal Mine Health and Safety Act of 1969.

Vacated and remanded.

1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Jurisdiction

The Secretary has both the jurisdiction and the obligation, upon appropriate application therefor, to review an order issued pursuant to sec. 103 of the Act.

2. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Delegation

The Secretary has delegated his jurdisdiction to review orders issued pursuant to sec. 103 of the Act to the Office of Hearings and Appeals for decision, initially by the Administrative Law Judges, and ultimately by the Interior Board of Mine Operations Appeals.

APPEARANCES: James R. Kyper, for appellant, Eastern Associated Coal Corp.; Steven B. Jacobson, Esq., for appellee, United Mine Workers of America; Richard V. Backley, Esq., and Frederick W. Moncrief, Esq., for appellee, Mining Enforcement and Safety Administration; John L. Kilcullen, Esq., and Michael J. Heenan, Esq., for amicus curiae, National Independent Coal Operators' Association.

OPINION BY ACTING CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This appeal presents for our consideration questions of first impression. We are asked to decide whether the Secretary has the statutory authority and obligation to review, upon timely application therefor, an order, or any modification thereof, issued under subsecs. (e) and (f) of sec. 103 of the Federal Coal Mine Health and Safety Act of 1969, and if so, whether he has delegated such authority and responsibility to the Office of Hearings and Appeals for decision by its Administrative Law Judges and the Board of Mine Operations Appeals. 30 U.S.C. § 813 (e) (f) (1970).[1]

[1] Subsections (e) and (f) of sec. 103 provide as follows:

"Notice of accident; preservation of evidence; supervision of rescue operations.

(e) In the event of any accident occurring in a coal mine, the operator shall notify the

Administrative Law Judge Koutras ruled that the Secretary has no such authority or obligation on the grounds that the Act expressly authorizes applications for review only with respect to sec. 104 orders,[2] 30 U.S.C. §§ 814, 815 (1970), and that initial adjudicative review of sec. 103 orders may be sought in an appropriate federal court of appeals under section 106 of the Act, 30 U.S.C. § 816 (1970). Based upon such ruling, Judge Koutras granted a prehearing motion to dismiss. For the reason set forth in detail below, we agree that there is no jurisdiction to review sec. 103 orders under sec. 105 of the Act. However, we are of the opinion that under secs. 103 and 106 of the Act, the Secretary has the jurisdiction and an obligation to review the subject sec. 103 orders, upon timely application therefor, and has delegated the authority and responsibility to comply with such obligation to the Office of Hearings and Appeals, by decision of its Administrative Law Judges initially, and by decision of the Board of Mine Operations Appeals ultimately. Accordingly, we are vacating the order of dismissal and remanding the case with instructions to dismiss without prejudice to a motion for leave to amend.

Procedural and Factual Background

On January 8, 1975, the subject order, denominated No. 1 AWB, was issued at the Keystone No. 1 Mine by Albert W. Barnett, Jr., a duly authorized inspector of the Mining Enforcement and Safety Administration (MESA). The Keystone Mine is located in the State of West Virginia and is owned and operated by appellant, Eastern Associated Coal Corporation (Eastern).

The subject order on its face was issued pursuant to sec. 103(f) of the Act subsequent to an alleged serious haulage accident in the 4 Main Section. 30 U.S.C. § 813(f) (1970). The order required withdrawal of all persons from that section, save for certain designated exceptions.

On January 9, 1975, Inspector Barnett issued a modified order, purportedly under subsecs. (e) and (f) of sec. 103. 30 U.S.C. § 813(e)

Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

"Orders to insure protection of persons and property.

(f) In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal."

[2] Although the subject application for review specifically relies on sec. 105 of the Act, the parties have properly argued the broader question of jurisdiction to review sec. 103 orders anywhere under the Act.

(f) (1970). This order permitted resumption of operations in the 4 Main Section provided certain conditions were met.

On February 4, 1975, within thirty days after the issuance of the initial order, Eastern filed an application for review, contending in substance that the order, and apparently the subsequent modification thereof, were improperly issued and invalid in several respects. On February 5, 1975, the United Mine Workers of America (UMWA), which is the representative of the miners at the subject mine, filed an answer in opposition. Five days later, on February 10, 1975, MESA did likewise.

Apart from filing its answer, the UMWA also submitted a motion to dismiss on the ground that neither the Secretary personally nor the Office of Hearings and Appeals, as his delegate, had jurisdiction. In its memorandum of points and authorities in support of its motion, the UMWA took the position that the Secretary's statutory authority to entertain applications for review is circumscribed by sec. 105 of the Act which provides only for review of certain notices and orders issued under sec. 104. Judge Koutras granted the UMWA's motion to dismiss by order dated March 6, 1975.

Eastern timely noted its appeal of the Judge's order on March 26, 1975. 43 CFR 4.600.

On June 3, 1975, the National Independent Coal Operators' Association (NICOA) petitioned the Board for leave to file a brief as an *amicus curiae*. By order dated June 11, 1975, the Board granted NICOA's petition.

Subsequently, all participants in the subject appeal filed timely briefs with the Board. Oral argument before the undersigned panel took place on July 9, 1975.

Issues on Appeal

A. Whether the Secretary of the Interior has a statutory obligation to review a section 103 order upon timely application or petition therefor.

B. Whether, assuming such statutory obligation exists *arguendo*, the Secretary has delegated the authority and responsibility to comply to the Office of Hearings and Appeals by decision of its Administrative Law Judges initially and the Board of Mine Operations Appeals ultimately.

Discussion

A.

[1] At the outset, it is appropriate to underscore that this case comes to us as an appeal by Eastern from a ruling in favor of the UMWA upon a prehearing motion to dismiss, predicated solely upon jurisdictional grounds.[3] In light of

[3] The UMWA has changed its position and now agrees that we have jurisdiction in this case. It argues, however, that the dismissal should be affirmed on the ground of mootness, the subject order having been allegedly terminated. We reject that argument. *See Eastern Associated Coal Corp.* v. *Interior Board of Mine Operations Appeals*, 491 F. 2d 277 (4th Cir. 1974) and *Freeman Coal Mining Co.* v. *Interior Board of Mine Operations Appeals*, 504 F. 2d 741, 743 (7th Cir. 1974).

this procedural posture, we are, for the purpose of deciding the subject appeal, assuming the truth of the allegations of fact contained in Eastern's application for review. *See A.K.P. Coal Co.*, 3 IBMA 136, 81 I.D. 226, 1973–1974 OSHD par. —, *aff'd sub nom A.K.P. Coal Co.* v. *Morton*, 501 F. 2d 1363 (6th Cir. 1974); *Hatfield* v. *Southern Ohio Coal Co.*, 4 IBMA 259, 82 I.D. 289, 1974–1975 OSHD par. 19,758 (1975). Moreover, given the lack of a record including an initial decision on the merits, we are also assuming that Eastern's application, as construed generously, states a legally sufficient claim for relief.[4]

Focusing attention now on the initial issue posed for our consideration, our analysis begins with Judge Koutras' holding that sec. 103 orders are not reviewable administratively because they do not fall within sec. 105 of the Act. 30 U.S.C. § 815 (1970). Citing our decision in *Eastern Associated Coal Corp.*, 4 IBMA 1, 82 I.D. 22, 1974–1975 OSHD par. 19,224 (1975),[5] the Judge concluded that: "A plain reading of the language contained in sec. 105(a)(1) of the Act indicates that Congress limited review by the Secretary to orders issued pursuant to sec. 104. * * * "

We think that the Judge has read sec. 105 of the Act and *Eastern*, *supra*, too broadly. In *Eastern* we dealt at length with the appropriate construction of that statutory mandate. Speaking descriptively, we said, 4 IBMA at 13, 82 I.D. at 28: "Considered by itself, sec. 105 is a provision apparently designed by the Congress to afford administrative due process to adversely affected parties regarding complaints that they may have concerning orders or certain notices issued pursuant to sec. 104. * * * " That statement, quoted by the Judge in his memorandum explaining his order, supports only the conclusion that a sec. 103 order is not reviewable under sec. 105 of the Act. It is not, however, authority for the proposition that if an order issued under the Act does not fall within the purview of sec. 105, such order is not *otherwise* administratively reviewable. That was a contention which was neither argued nor dealt with by the Board, expressly *or* impliedly. In our opinion, sec. 105 provides no answer to the question of whether the Secretary is obligated to review a sec. 103 order; it is merely silent on that issue.

Although the analysis of sec. 105 is the principal underpinning employed by the Judge to sustain his order of dismissal, he also drew support from the provisions of section 106 of the Act, 30 U.S.C. § 816 (a)

[4] On appeal, the parties have all sought to argue whether an inspector has authority under sec. 103 to order withdrawal of persons from designated areas. Whether such orders fall exclusively within the purview of sec. 104 of the Act, or whether those issued in the subject case abused the discretion conferred upon the Secretary in sec. 103 are issues going to the merits.

[5] An appeal of the Board's decision in this case is now pending in the United States Court of Appeals for the District of Columbia Circuit, No. 75–1107.

(b) (1970), which reads in pertinent part as follows:

> (a) Any order or decision issued by the Secretary * * * under this chapter, except an order or decision under section 819(a) of this title, shall be subject to judicial review by the United States court of appeals for the circuit in which the affected mine is located, or the United States Court of Appeals for the District of Columbia Circuit, upon the filing in such court within thirty days from the date of such order or decision of a petition by any person aggrieved by the order or decision praying that the order or decision be modified or set aside in whole or in part, except that the court shall not consider such petition unless such person has exhausted the administrative remedies available under this chapter. A copy of the petition shall forthwith be sent by registered or certified mail to the other party and to the Secretary * * *, and thereupon the Secretary * * * shall certify and file in such court the record upon which the order or decision complained of was issued, as provided in section 2112 of Title 28.
>
> Evidence; conclusiveness of findings; orders
>
> (b) The court shall hear such petition on the record made before the Secretary * * *. The findings of the Secretary * * *, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the Secretary * * * for such further action as it may direct.

Recognizing that Eastern had a right to a review in some forum, the Judge expressed the opinion that, under that section, the initial adjudicative forum for review of a sec. 103 order was the appropriate federal court of appeals.

On appeal to the Board, Eastern acknowledges that sec. 106 is the applicable judicial review provision of the Act, but contends that the Judge misapprehended the true impact of that section on this case. Eastern argues that sec. 106 precludes direct review of a Secretarial order, that is to say, *de novo* review. In this connection, specific reliance is placed upon subsec. (b) of sec. 106 which requires the court to hear a petition for review "* * * on the record made before the Secretary * * *."

By way of response, MESA argues that Eastern could file a petition for review in an appropriate district court of the United States and obtain a hearing there.

In our view, Eastern has much the better part of this argument. In the first place, petitions for review in the district courts for the purpose of testing the *statutory* validity of a Secretarial order in non-penalty cases are apparently precluded by sec. 507 of the Act. 30 U.S.C. § 956 (1970).[6] Second, the Supreme Court has held repeatedly that "* * * where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on a particular problem, those procedures are to be exclusive. * * *" *Whitney Bank* v. *New Orleans Bank*, 379 U.S. 411,

[6] To our knowledge, no court has yet construed sec. 507 of the Act, but it may well be that in penalty cases, which do not fall within sec. 106, a petition for review in a district court may lie to test a constitutional issue which could not be presented to the Secretary or otherwise litigated in a federal court at the operator's initiative. *See Zeigler Coal Co.*, 4 IBMA 139, 149, n. 5, 82 I.D. 221, 1974–1975 OSHD par. 19,638 (1975).

420 (1965). Third, sec. 106 allows for "remand," where appropriate, only to the Secretary and makes no mention of a district court as an alternative fact finder. Lastly, as Eastern points out, sec. 106 expressly makes it incumbent upon the Secretary to create a reviewable record which impliedly means that he is under a statutory obligation to review in some manner all decisions and orders issued in his name in non-penalty cases upon timely application or petition therefor. Thus, although we agree with the Judge that sec. 106 is a relevant index of legislative intent, we hold, contrary to his conclusion, that this section mandates that initial adjudicative review of the subject order be conducted by the Secretary.

We draw additional support for our holding from sec. 103 itself. Subsec. (d) thereof provides in pertinent part as follows:

> For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. * * *

This subsec. presupposes that the Secretary will take the necessary steps to make a reviewable record where a controversy arises, and grants to him flexibility and appropriate powers to perform that function.[7]

In construing the Act, as we do, to require the Secretary to make a record in cases such as the one at bar, we have been primarily guided by the relevant statutory language. But, in addition, we believe that our interpretation effectuates what was intended to be a uniform legislative policy allocating complementary review functions between the courts and the Secretary for the purpose of providing due process of law. That policy, in our view, calls for preliminary resort to the Secretary who is better equipped than the courts by flexible procedures, specialization, and accumulated insights borne of experience to ascertain and interpret the technical facts and the law in the first instance. Then too, the Congress cannot have been unaware of the concomitant benefits which would accrue from a policy that promotes consistency of regulation and that relieves the enormously busy federal courts of the primary adjudicative burdens under the Act.

In view of the foregoing analysis, we concur in Judge Koutras' conclusion that there is no jurisdiction to review the subject orders under sec. 105 of the Act. However, we are of the opinion that he was in error when he granted outright dismissal based upon such conclusion because the preamble of the application for review can be amended to cite sections 103(d) and section 106

[7] We note that the term "investigation" in the above-quoted subsection appears in sec. 105 as well. That term has been taken to include an adversarial proceeding in the Office of Hearings and Appeals. *Compare* 30 U.S.C. § 813(d) *with* 30 U.S.C. § 815 (1970). *See* 43 CFR 4.500(a)(1), 4.500(a)(6), 4.500(c).

which provide the statutory basis for jurisdiction.

B.

[2] We turn now to the question of whether the Secretary has delegated authority to and placed the responsibility upon the Office of Hearings and Appeals by the hearing and decision process of its Administrative Law Judges and the Board of Mine Operations Appeals to comply with his statutory obligation to make a record in the case at hand. The answer to this query turns upon the appropriate construction of pertinent delegation and jurisdictional regulations of the Secretary, namely, 43 CFR 4.1, 4.1(4), 4.500(a)(6), 4.500(c). In construing these regulations with due regard for their literal language and underlying intent and purposes, we bear in mind that, in 43 CFR 4.505 (b), the Secretary has provided that:

> These rules shall be liberally construed to secure the just, prompt and inexpensive determination of all proceedings consistent with adequate consideration of the issues involved.

Section 4.1 of 43 CFR reads in relevant part as follows:

> The Office of Hearings and Appeals headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary. [Footnote omitted.] Principal components of the Office include (a) a Hearings Division comprised of administrative law judges who are authorized to conduct hearings in cases required by law to be conducted pursuant to 5 U.S.C. sec. 554, * * * and hearings in other cases arising under statutes and regulations of the Department * * * and (b) Appeals Boards * * * with administrative jurisdiction and special procedural rules * * *.

More specifically, with regard to the Board of Mine Operations Appeals, subsec. (4) of sec. 4.1 of 43 CFR states in pertinent part:

> The Board performs finally for the Department the appellate and other review functions of the Secretary under the Federal Coal Mine Health and Safety Act of 1969 * * *.

At oral argument, MESA urged us to construe the above-quoted provisions to relate only to claims for which there is specific statutory provision. *See* 30 U.S.C. §§ 815, 819, 820, 861 (1970). MESA argued that the Secretary neither authorized nor intended that the Administrative Law Judges or the Board have jurisdiction over anything more.

We reject MESA's position on both scores; we believe such jurisdiction was both authorized and intended.

With respect to what the literal language authorizes, we construe the term "review function" to include the making of a "record," as that term is used in section 106 of the Act. It is also plain on the face of the subject application for *review* that Eastern is presenting an "appeal" to the Secretary within the meaning of 43 CFR 4.1 for an administrative remedy with respect to allegedly improper and unlawful orders issued in his name under the

Act. Also, we think it clear that the determination as to whether and what kind of public hearing should be held under sec. 103(d) falls within the regulatory phrase "* * * matters within the jurisdiction of the Department involving hearings * * *."

The contrary limiting construction of 43 CFR 4.1 pressed upon us by MESA is in our view inconsistent with the portions of that regulation which authorize the Administrative Law Judges "* * * to conduct hearings in cases required by law to be conducted pursuant to 5 U.S.C. sec. 554 (1970), * * * *and hearings in other cases arising under statutes and regulations of the Department* * * *," and contemplate ultimate review by the Board. Inasmuch as all claims for administrative relief under the Act for which there is specific statutory authorization except compensation cases are required to be resolved only after opportunity for a hearing conducted pursuant to 5 U.S.C. § 554 (1970), the italicized phrase would be nearly meaningless unless it is held to embrace cases, such as the one at bar, where the dimensions of a hearing, if any, are discretionary and need accord only with traditional notions of minimum administrative due process. *See* 30 U.S.C. §§ 815(a), 819, 820, 861 (1970).

Furthermore, any lingering semantical doubt as to the ambit of the broad phrases "* * * matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary * * *," and "* * * hearings in other cases arising under statutes and regulations of the Department * * *," is resolved when one looks to the provisions of 43 CFR 4.500(a) and 4.500(c). The former reads as follows:

> (a) The Board of Mine Operations Appeals, under the direction of a Board Chairman [Chief Administrative Judge], is authorized to exercise, pursuant to regulations published in the FEDERAL REGISTER, the authority of the Secretary under the Federal Coal Mine Health and Safety Act of 1969 pertaining to:
>
> (1) Applications for review of withdrawal orders; notices fixing a time for abatement of violations of mandatory health or safety standards; discharge or acts of discrimination for invoking rights under the Act, and entitlement of miners to compensation;
>
> (2) Assessment of civil penalties for violation of mandatory health or safety standards or other provisions of the Act;
>
> (3) Applications for temporary relief in appropriate cases;
>
> (4) Petitions for modification of mandatory safety standards;
>
> (5) Appeals from orders and decisions of administrative law judges; and
>
> (6) *All other appeals and review procedures cognizable by the Secretary under the Act.* [Italics added.]

The latter states:

> (c) In the exercise of the foregoing functions the Board is authorized to cause investigations to be made, order hearings, and issue orders and notices as deemed appropriate to secure the just and prompt determination of all proceedings. Decisions of the Board on all matters within its judisdiction shall be final for the Department.

A close reading of 43 CFR 4.500 (a) reveals that, in providing for our jurisdiction, the Secretary listed

all the claims for administrative relief for which there is specific express statutory authorization *plus* in subsec. (a)(6): "All other appeals and review procedures cognizable by the Secretary under the Act." When MESA advocated a limited construction of 43 CFR 4.1 at oral argument before the Board and was confronted with subsec. (a)(6) of 43 CFR 4.500, it was unable to suggest an interpretation of that clause which would infuse it with meaning and at the same time exclude the instant case. In our opinion, that failure was due to the virtually inescapable conclusion from the language of 43 CFR 4.500 (a)(6) alone that 43 CFR 4.1 was calculated to cover claims for relief, arising under the Act and susceptible to administrative adjudication, but for which the Congress and the Secretary provided no express, binding procedure or detailed standards of review. *Compare* 30 U.S.C. §§ 820(a) and 861(c) *with* 30 U.S.C. § 813(d) (1970). Subsec. (c) of 43 CFR 4.500 reinforces this viewpoint because there would have been no need to grant the Board discretion "* * * *to cause investigations to be made, order hearings,* and issue orders and notices as deemed appropriate * * *" (*Italics* added) unless there were instances under the Act where such discretion could and should be exercised in an adjudicative setting. It seems to us that the case at hand is archetypically one of those instances, since sec. 103(d) by its very terms provides for "investigation" and a discretionary "public hearing" with regard to "* * * any accident or other occurrence relating to health or safety in a coal mine, * * *" a description which obviously applies to orders issued under subsecs. (e) and (f) of sec. 103. 30 U.S.C. §§ 813 (d) (e) and (f) (1970).

Quite apart from what can be gleaned from the literal terms of the above-quoted regulations, we must also, as indicated earlier, decline acceptance of a limited construction of the review jurisdiction of the Office of Hearings and Appeals under the Act because we believe such construction to be in manifest disharmony with the Secretary's intentions and purposes.

The delegation of authority to the Office of Hearings and Appeals of the Secretary's review obligations under the Act is couched in the broadest conceivable language, subject only to a reservation of supervisory and any other powers conferred by law. 43 CFR 4.5. The very broadness of the jurisdictional regulations analyzed above is indicative of the Secretary's desire to institutionalize accomplishment of any and all adjudicative tasks incident to his statutory obligation to provide administrative remedies in meritorious cases and methods for exhaustion of such remedies to disgruntled litigants with standing. The language thus reveals an intent to avoid invocation of his personal jurisdiction, except in extraordinary cases calling for the exercise of his reserved powers. We observe parenthetically that such a case, in-

voking his personal jurisdiction, has never arisen.

The purposes for such a broad delegation of authority are several.

First, given his manifold responsibilities and finite energies, personal consideration of each and every appeal is physically impossible. The creation of the Office of Hearings and Appeals within the Office of the Secretary provided a mechanism for physical accomplishment of adjudicative tasks, including the making of a record, while ultimate supervisory authority was retained.

Second, the Secretary was well aware that enforcement errors were bound to occur and wished to assure himself that such errors would be discovered and remedied at the administrative level to the extent allowable under the law. He must have known that a system separating enforcement and adjudicative functions and giving the opportunity for an adversarial proceeding has a greater tendency to flush such errors into the open than is the case where the enforcing agent is the sole judge of its own actions.

Third, separation of functions serves the Secretary's determination to provide both substantive and apparent impartial adjudication. Such adjudication is essential for compliance with the Secretary's broad obligations to the Congress, the federal courts, and the public alike, to make a genuine, open accounting for actions taken in his name, where timely challenged by someone aggrieved who has standing. The Secretary must have thought that a system of divided authority would enable him to maintain public confidence in the integrity of his administration of the Act.

We are of course cognizant of the possibility that separation of functions can contribute to inconsistency in the overall enforcement of the Act, even though our decision in adjudicative matters prevents inconsistency within the Office of Hearings and Appeals and is final for the Department. 43 CFR 4.1, 4.1(4), 4.500(c). In order to avoid realization of such results, we have not been hesitant to reject invitations to extend our jurisdiction and to interfere unduly in the sphere of authority allocated to the Secretary's enforcement arm, MESA. *See e.g., Freeman Coal Mining Corp.*, 1 IBMA 1, 77 I.D. 149, 1971–1973 OSHD par. 15,367 (1970); *Clinchfield Coal Co.*, 3 IBMA 154, 81 I.D. 276, 1973–1974 OSHD par. 17,812 (1974); *Eastern Associated Coal Corp., supra; Eastern Associated Coal Corp.*, 4 IBMA 298, 306, 82 I.D. 311, 1974–1975 OSHD par. 19,774 (1975). However, we are of the opinion that the case at hand does not fall within the class of those just cited. Indeed, any conclusion otherwise would amount to an abdication of our responsibility to make final adjudicative decisions for the Secretary. Moreover, it would violate our obligation to construe our jurisdictional regulations generously so as to avoid appeals to federal courts which are expensive

and time consuming to litigants and taxpayers alike and where the result is virtually foregone. 43 CFR 4.505(b).[8]

Consistent with the language of the pertinent regulations and the intent and purposes of the Secretary, as we understand them, we are not prepared to find an exception to our delegation of review authority in cases arising under the Act unless such exception is *expressly* made. No such exception exists with respect to orders issued under section 103, and we, therefore, conclude that the Judge erred in holding that he was without jurisdiction to hold a hearing, as appropriate, and render an initial decision in the case at hand. 43 CFR 4.1, 4.580.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), the order of dismissal in the above-captioned docket IS VACATED and the case IS REMANDED with instructions to dismiss without prejudice to a motion for leave to amend.

DAVID DOANE,
Acting Chief Administrative Judge.

I CONCUR:

DAVID TORBETT,
Acting Director,
Office of Hearings and Appeals
Ex-Officio Member of the Board

[8] As we indicated earlier, a reviewing court of appeals would undoubtedly remand to the Secretary with instructions to make a record which would probably mean referral to the Office of Hearings and Appeals.

DISSENTING OPINION OF HOWARD J. SCHELLENBERG, JR., ALTERNATE ADMINISTRATIVE JUDGE:

Eastern Associated Coal Corporation seeks review of an order issued by MESA pursuant to section 103(f) of the Act. Such review is sought under the provisions of section 105(a) of the Act (30 U.S.C. § 815(a)) and 43 CFR 4.530. There can be no dispute that the statutory review provided for in section 105(a) is specifically limited to an order issued pursuant to section 104.

Furthermore, since the term "withdrawal order" as used in the regulations is defined by the Secretary to mean an order issued under section 104 of the Act (43 CFR 4.506(d)), the regulation implementing this statutory provision is limited to withdrawal orders issued under section 104. I find the Board limited by the Secretary to review of only orders issued pursuant to section 104 of the Act. I find no other express or implied power in this Board to entertain review of orders issued pursuant to section 103(f) of the Act. I respectfully dissent.

HOWARD J. SCHELLENBERG, JR.,
Alternate Administrative Judge.

ESTATE OF KE-I-ZE OR JULIAN SANDOVAL

4 IBIA 115

Decided *August 18, 1975*

Petition To Reopen.

DENIED.

1. Indian Probate: Reopening: Generally—375.0

A petition for the reopening of an Indian heirship proceeding filed 12 years after the Department had determined the heirs of the Indian decedent will be denied as untimely.

2. Indian Probate: Reopening: Generally—375.0

A request for a reopening filed years after the expiration of the period allowed will be denied even where the request for reopening is made by one who was not given an opportunity to be heard and who would clearly be entitled to the relief sought if his petition had been timely made.

3. Indian Probate: Reopening: Waiver of Time Limitation—375.1

It is in the public interest to require Indian probate proceedings to be concluded within some reasonable time in order that the property rights of heirs and devisees of trust allotments be stabilized.

APPEARANCES: Michael Celestre, Attorney for Chee Joe Sandoval, and Robert Cardin of White and Cardin, for Bessie Sandoval, et al.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before this Board on a Recommended Order on Petition for Reopening made by Administrative Law Judge Richard B. Denu on January 28, 1975.

The record indicates an order determining heirs was made in the estate of Ke-i-ze or Julian Sandoval on February 24, 1953, wherein Bessie Sandoval, wife, and twelve children, Samuel Sandoval, Merrill Sandoval, Roger Sandoval, Beulah S. Kelly, Franklin D. Sandoval, Denny Sandoval, Mabel C. Sandoval, Daniel Sandoval, Bert Sandoval, Betsy Sandoval, Nellie Sandoval, and Benjamin Sandoval, hereinafter referred to as respondents, were found to be the legal heirs of the decedent.

On November 22, 1972, Chee Joe Sandoval, hereinafter referred to as petitioner, through his attorney, Michael Celestre, filed a petition to reopen the estate with the Administrative Law Judge.

The petition was submitted to this Board by the Administrative Law Judge on December 11, 1972, with his recommendation that the estate be reopened. On October 17, 1973, a Preliminary Procedural Order issued from this Board, conditionally reopening the case. The matter was then remanded to the Administrative Law Judge for further proceedings.

The petitioner on February 4, 1974, filed a petition for reopening, copy whereof is attached, p. 405 and made a part hereof, as directed by the said procedural order.

Respondents in answer to the petition on May 2, 1974, denied all allegations set forth therein except for that part of paragraph 1 admitting that Julian Sandoval was a Navajo, Census Number 12253.

The matter was scheduled for hearing at Gallup, New Mexico, on July 17, 1974, at which time petitioner and respondents appeared with their attorneys and witnesses.

From the testimony taken at the hearing the Administrative Law Judge in his order of January 28, 1975, found as follows:

> 1. Petitioner Chee Joe Sandoval has established convincingly that he is a son of the decedent, Julian Sandoval.
>
> 2. Petitioner was not remiss, or guilty of laches, for not acting sooner in the matter of attempting to reopen the estate of Julian Sandoval.

The Judge further in his order recommended:

> I recommend that the above entitled matter be declared reopened to permit modification of the Order Determining Heirs.
>
> I further recommend that the Order Determining Heirs aforesaid, of February 24, 1953, be modified and amended and corrected to include petitioner Chee Joe Sandoval as a son and heir and that shares of issue of decedent be changed accordingly.

The Board, like the respondents, is not in agreement with the findings of the Administrative Law Judge as set forth above.

The petitioner has failed to substantiate his claim by clear and convincing proof that he is a son of the decedent. His claim is based largely on the uncorroborated testimony of his mother, Maggie Joe Morgan, that she and the decedent had established relations resulting in the birth of the petitioner on September 5, 1932. Her testimony further indicated she continued to live with decedent at least three years after the petitioner's birth. This appears to be in direct conflict with the decedent's surviving spouse's testimony that she and decedent left Crown Point as early as 1934.

Herbert Cowboy's testimony in support of Mrs. Morgan's contention lacks any real or corroborative effect. His testimony merely indicates he saw Mrs. Morgan and decedent at Crown Point on some occasions. Mr. Cowboy's testimony wholly fails to establish cohabitation, or for that matter, even the maintenance of a home.

The petitioner's testimony that he had met the decedent in either 1938 or 1939 at the age of six or seven years appears questionable in view of the fact that the decedent had moved from Crown Point some four or five years before. Moreover, the foregoing is in conflict with the petitioner's testimony on cross-examination that he had never met the decedent and that he did not know who Julian Sandoval was. Aside from the foregoing, the petitioner could add very little in support of his claim.

At most the testimony given in support of the petitioner's claim is self-serving, fraught with discrepancies regarding critical time elements and uncorroborated. Clearly, the petitioner has failed to establish the alleged Father-Son relationship by clear and convincing proof and the Board so finds. The burden of doing so was incumbent upon the petitioner.

Assuming *arguendo* that the alleged relationship had been estab-

lished by the weight of the evidence, the petitioner's lack of diligence in asserting his rights for some ten years in itself would be sufficient and adequate reason to deny his petition.

The Department has consistently adhered to the rule of denying petitions for reopening where petitions have not been timely filed.

[1] A petition for the reopening of an Indian heirship proceeding filed 12 years after the Department had determined the heirs of the Indian decedent will be denied as untimely. *Estate of Annie Red Horse Davis*, IA–1517 (March 16, 1966).

[2] A request for a reopening filed years after the expiration of the period allowed will be denied even where the request is made by one who was not given an opportunity to be heard and who would be clearly entitled to the relief sought if his petition had been timely made. *Estate of Jesse Swan*, IA–1268 (April 28, 1966).

Moreover, the Department has long adhered to the policy of leaving undisturbed Indian probate decisions of long standing to avoid disrupting titles or creating clouds thereon.

[3] It is in the public interest to require Indian probate proceedings be concluded within some reasonable time in order that property rights of heirs and devisees in Indian allotments be stabilized. *Estate of Hah-Tah-E-Yazza (Navajo Allottee No. 011358, Deceased)*, 2 IBIA 93, 80 I.D. 709 (1973). To hold property rights of heirs of allotted lands forever subject to challenge would not only constitute an abuse, but would seriously erode the property rights of those whose heirship in lands had already been determined. *Estate of Samuel Picknoll (Pickernell)*, 1 IBIA 168, 78 I.D. 325 (1971).

For the reasons hereinabove stated the petition for reopening filed by Chee Joe Sandoval must be denied, notwithstanding the Administrative Law Judge's recommendation to the contrary.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition to Reopen filed by Chee Joe Sandoval be, and the same is hereby DENIED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

PETITION FOR REOPENING

February 4, 1974

CHEE JOE SANDOVAL, PETITIONER, *vs.* EXAMINER OF INHERITANCE, RESPONDENT.

Petitioner, Chee Joe Sandoval, as his petition for reopening the decision by the Examiner of Inheritance under 43 CFR § 4.242(h) alleges,

1. That Mr. Julian Sandoval, census number 12253, and Mrs. Maggie Joe Morgan, census number 10869, were Navajo Indians.

2. That on or about December 5, 1931, Mr. Julian Sandoval and Mrs. Maggie Joe Morgan cohabited together as husband and wife according to the custom and manner of the Navajo Tribe. The petitioner, census number 10868A, was the issue of such cohabitation and was born on September 5, 1932. A true and correct copy of petitioner's census card is attached hereto, marked Exhibit "A", and incorporated by reference herein.

3. That according to 25 U.S.C.A. § 371, § 5, 26 Stat. 795, petitioner for the purpose of determining the heirs of Mr. Julian Sandoval for the descent of land must be deemed the legitimate issue of Mr. Julian Sandoval.

4. That Mr. Julian Sandoval died intestate on August 30, 1952. That Mr. Sandoval so died was recorded by Mr. Edward S. Stewart, Examiner of Inheritance in an Order Determining Heirs. A true and correct copy of said order is attached hereto, marked page 91 of Exhibit "B", and incorporated by reference herein.

5. That an Examiner of Inheritance, Mr. Edward S. Stewart, was appointed by the Secretary of the Interior to determine the heirs of said Julian Sandoval and determine their respective shares of Mr. Julian Sandoval's estate.

6. That Mr. Julian Sandoval had an interest in allotments Nos. 213, 011392, 011389, 011381 and in the unalloted case of Robert Sandoval.

7. That patents to said allotments have been issued by the Secretary of the Interior in the name of the allotees in trust for the sole use and benefit of the allottees by virtue of 25 U.S.C.A. § 348. That the Secretary of the Interior is the trustee and the allottees are the beneficiaries of said trust. That said trust has been extended by the order of the President of the United States.

8. That notice of the hearing to be held by the Examiner of Inheritance was sent to several of the beneficiaries of the trust on February 12, 1953, page 104 of Exhibit "B". However, notice was not sent to petitioner at that time and petitioner had no notice of the Hearing to Determine Heirs or Probate the Will that was held on February 4, 1953 at the Phoenix Area Office, Phoenix, Arizona. Petitioner did not receive constructive notice of the hearing because he was in the Armed Forces of the United States in France at the time of his father's death and until after the hearing by the Examiner of Inheritance, as stated in petitioner's affidavit, marked Exhibit "C" and incorporated by reference herein.

9. That petitioner only recently became aware of his failure to be notified of the hearing and the failure of the Examiner of Inheritance to award petitioner his share of Mr. Julian Sandoval's estate, as stated in "C".

10. That the Superintendent or other area field representative who had jurisdiction over Mr. Julian Sandoval's estate failed to adequately examine the records of the Bureau of Indian Affairs. But that if it is found that an adequate examination took place then the Bureau of Indian Affairs failed to adequately keep those records. For whichever the cause, the name and last known address of petitioner was not forwarded to the Examiner of Inheritance as one of the presumptive heirs of decedent, Mr. Julian Sandoval. In not doing so the Superintendent or other area field representative failed to comply with the predecessor section of 43 CFR § 4.210(b)(2)(ii).

11. That by failing to send notice of the Hearing to Determine Heirs to petitioner, the Examiner of Inheritance failed to comply with the predecessor section of 43 CFR 4.211(b).

12. That the Order Determining Heirs, page 91 of Exhibit "B" in failing to recognize the share of petitioner violated 25 U.S.C.A. § 371, § 5, 26 Stat. 795.

13. That because petitioner lacked either actual or constructive notice of

said hearing, the Examiner of Inheritance failed to have jurisdiction to render a valid order under 25 U.S.C.A. § 372, *Mullane* v. *Central Hanover B. & T. Co.*, 70 S. Ct. 652, 339 U.S. 306, 94 L. Ed. 865 (1950).

Wherefore, petitioner prays that the decision of the Examiner of Inheritance be set aside as without jurisdiction and the Examiner of Inheritance reopen the decision under 43 CFR 4.242(h). Petitioner then prays that another hearing be ordered to determine the heirs of Mr. Julian Sandoval under 43 CFR § 4.200 et seq.

CHEE JOE SANDOVAL,
Petitioner,
411 Arno S.E.
Albuquerque, New Mexico

MICHAEL CELESTRE,
LAWRENCE C. MALICK,
Attorneys for Petitioner,
Post Office Box 116
Crownpoint, New Mexico 87313

AFFIDAVITS

(1)

CHEE JOE SANDOVAL, PETITIONER, *vs.* EXAMINER OF INHERITANCE, RESPONDENT. STATE OF NEW MEXICO, COUNTY OF McKINLEY.

CHEE JOE SANDOVAL, being first duly sworn, upon oath deposes and says:

I first became aware that my father had died in 1962 at a Yei be cha Dance at Dalton Pass, New Mexico. In 1969 or 1970 because of my contact with the Bureau of Indian Affairs I asked the Census Office in Crownpoint to give me a copy of my father's census card.

When I saw the census card and discovered that my name was not listed, I then asked to see my father's file but I was refused permission. I then contacted DNA Legal Assistance about how to obtain copies of my father's records at the Bureau of Indian Affairs. Through their assistance I obtained those records and noticed that my father's land had been distributed to some of the heirs.

Only in 1972 did I become aware of the procedure for correcting the mistake made in the probate of my father's allotment.

(S) CHEE JOE SANDOVAL.

SUBSCRIBED AND SWORN to before me this 4th day of February, 1974.

(S) Christina Ellsworth,
Notary Public.

My Commission Expires: 10–13–77.

(2)

MAGGIE J. MORGAN, being first duly sworn, upon oath deposes and says:

That about a year prior to the birth of my son Chee Joe Sandoval, Julian Sandoval and I began to live together as man and wife according to the Navajo custom. We were living together in my house at Dalton Pass.

Chee Joe Sandoval was born in 1932 and was the son of Mr. Julian Sandoval. Julian Sandoval and I continued to live together for two more years. In about 1934 Mr. Sandoval left my home and began to live with another woman.

About four months after Julian left me I went to the Chapter Officers in Crownpoint and asked them to help me make Julian Sandoval support his child. At the hearing held by the Chapter officers Julian Sandoval agreed to support his son, Chee Joe Sandoval.

MAGGIE MORGAN.

SUBSCRIBED AND SWORN to before me this 4th day of February, 1974.

(S) Christina Ellsworth,
Notary Public.

My Commission Expires: 10–13–77

ESTATE OF GEI-KAUN-MAH (BERT)

4 IBIA 129

Decided *August 20, 1975*

Petition for Extension of Time To File Notice of Appeal.

DISMISSED.

1. Indian Probate: Appeal: Extension of Time for Filing—130.10

That part of 43 CFR 4.22(f) (1) that precludes extensions of time for filing notices of appeal is jurisdictional from which there is no further administrative appeal or remedy.

APPEARANCES: Robert T. Keel, Esq., for Petitioners Juanita Geikaunmah Mannedate, Imogene Geikaunmah Carter, and Blossom Geikaunmah Dupoint.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

A petition for extension of time to file notice of appeal has been filed in the above-entitled matter by Jaunita Geikaunmah Mannedate, Imogene Geikaunmah Carter, and Blossom Geikaunmah Dupoint through their attorney, Robert T. Keel. The petition, copy of which is attached, p. 409 and made a part hereof, together with the probate record was received by this Board on July 3, 1975.

The petition is in effect an appeal from a decision issued by Administrative Law Judge Jack M. Short denying a similar petition for the reason that 43 CFR 4.22(f) (1) precluded the granting of an extension of time for filing a notice of appeal. The Judge in addition thereto, gave the following grounds for the denial:

> Petitioners for the extension of time to file a notice of appeal were among the petitioners for rehearing; they were represented on their petition for rehearing by competent legal counsel; and, that they had ample time to file a notice of appeal before the decision denying their petition for rehearing became final.

Regulations regarding extensions of time for filing documents appear at 43 CFR 4.22(f) (1). Pertinent parts thereof provide:

> The time for filing or serving any document may be extended by the Appeals Board or other officer before whom the proceeding is pending, *except for the time for filing a notice of appeal* and except where such extension is contrary to law or regulation. (Italics supplied.)

[1] Clearly, the italicized portion of the above-quoted regulation, *supra*, is jurisdictional from which there is no further administrative appeal or remedy. Accordingly, this Board acting for the Secretary under delegated authority in probate matters is without jurisdiction to grant the petitioner's request and, therefore, the petition must be DISMISSED.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for extension of time for filing notice of appeal filed

by the petitioners through their attorney be and the same is hereby DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

In the Estate of GEI-KAUN-MAH (BERT), IP TU 42P 73
Deceased Kiowa Allottee No. 2571. IP TU 152P 75

PETITION FOR EXTENSION OF TIME TO FILE NOTICE OF APPEAL

Comes now Robert T. Keel, counsel for Juanita Geikaunmah Mannedate, Imogene Geikaunmah Carter, and Blossom Geikaunmah Dupoint, interested parties, and requests the Board of Indian Appeals for an extension of time in which to file a Notice of Appeal in the above-entitled cause and in support of said Petition states:

1. That petitioners changed attorneys and were not aware that the decision became final on June 3, 1975.

2. That counsel did not receive the file in his office until June 3, 1975, the date the decision became final, and that he was out of the State all of that week and had no opportunity to see the file until he returned to his office on June 9, 1975, and did not have the opportunity to file a timely Notice of Appeal;

3. That counsel believes the above interested parties have sufficient evidence for an appeal.

4. That a Petition for Extension of Time was denied by the Honorable Jack M. Short, Administrative Law Judge on July 2, 1975.

WHEREFORE, Robert T. Keel, counsel for Juanita Geikaunmah Mammedaty, Imogene Geikaunmah Carter, and Blossom Geikaunmah Dupoint, interested parties, requests the Board of Indian Appeals for an extension of time in which to file an appeal in the above-entitled cause.

Dated this 10th day of July, 1975.

(S) ROBERT T. KEEL,
1607 First National Center,
Oklahoma City, Oklahoma 73102
232-8419

IN THE MATTER OF ALABAMA BY-PRODUCTS CORPORATION (MAXINE MINE)

5 IBMA 100

Decided *August 25, 1975*

Applications for Review.

1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Notice and Service

Pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a) (1970), and 30 CFR 81.5, an operator is obliged to serve an application for review on the appropriate representative of miners at the address listed in the valid, existing certificate of representation.

2. Federal Coal Mine Health and Safety Act of 1969: Parties: Failure To Participate

The obligation of a representative of miners to file a responsive pleading under 43 CFR 4.507(c), in order to thereafter participate in the proceeding, arises after the operator has perfected service of the application for review upon such representative.

APPEARANCES: J. Fred McDuff, Esq., F. J. Gale, III, Esq., for appellee, Alabama By-Products Corp.; Steven B. Jacobson, Esq., for appellant, United Mine Workers of America.

MEMORANDUM OPINION AND ORDER

INTERIOR BOARD OF MINE OPERATIONS APPEALS

By motion filed May 28, 1975, Alabama By-Products Corporation (Alabama) seeks dismissal of the above-captioned appeal on the grounds that appellant United Mine Workers of America (UMWA) failed to file an answer, as required under 43 CFR 4.507(c), and did not otherwise participate in the subject review proceedings before Administrative Law Judge George H. Painter. *See Old Ben Coal Corp.*, 4 IBMA 104, 82 I.D. 160, 1974–1975 OSHD par. 19,511 (1975) and *Old Ben Coal Co.*, 5 IBMA 19, 82 I.D. 355, 1975–1976 OSHD par. 19,870 (1975). For the reasons set forth below, we conclude that Alabama failed to perfect service upon the UMWA and that accordingly the Union cannot be penalized for failure to file an answer or other failures to participate. Therefore, the motion to dismiss will be denied. We have also decided that it would be more appropriate in the circumstances to vacate the decision below and remand the case so that the Union can present its argument to Judge Painter whose decision is here under attack.

Procedural and Factual Background

The subject proceedings arise out of two related applications for review filed by Alabama on November 18 and 25, 1974, respectively. 30 U.S.C. § 815 (1970). By these applications, Alabama challenged the validity of a notice of violation and two related orders of withdrawal which had been issued pursuant to section 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814 (c)(1) (1970).

A certificate of service was appended to each application and recited that service by certified mail with return-receipt requested had been made on the following:

Sam Littlefield, President
District 20
United Mine Workers of America
512–522 City Federal Building
Birmingham, Alabama 35203

Cecil Nolan, President
Local 9984
United Mine Workers of America
Post Office Box 942
Jasper, Alabama 35541

The record reveals that the return receipts were never filed with the Hearings Division, as is required under 43 CFR 4.509(d).

Separate evidentiary hearings were held by Judge Painter on February 18, 1975. Two months later, on April 18, 1975, he handed down a consolidated decision with respect to the subject dockets in which he vacated the disputed notice and related withdrawal orders.

The UMWA did not file a responsive pleading to the subject applica-

tions for review. Neither did the Union participate at any other stage of the proceedings before Judge Painter.

Following service of the decision below at its national headquarters in Washington, D.C., the UMWA filed a notice of appeal with the Board. 43 CFR 4.600.

On May 28, 1975, Alabama moved for dismissal. 43 CFR 4.510. The UMWA filed a statement in opposition thereto on May 30, 1975. Subsequently, on June 9, 1975, Alabama responded to the Union's statement. Thereafter, having received permission of the Board, the Union filed a statement in rebuttal to Alabama's June 9 response.[1]

By order dated July 1, 1975, the Board granted a motion by the UMWA to hold briefing on the merits in abeyance pending a ruling on Alabama's motion to dismiss and further order of the Board.

Issue Presented

Whether Alabama By-Products Corporation perfected service of the subject applications for review on the representative of miners at the subject mine.

Discussion

[1] As indicated earlier, service of the applications for review was made on two officials of the UMWA local whose members are employed at the subject mine. Alabama contends that such service complied with its statutory and regulatory obligation to serve a copy of an application for review on the representative of miners at the subject mine. 30 U.S.C. § 815(a) (1970). 43 CFR 4.530(d). Alabama further contends in substance that, upon such service, the jurisdiction of the Hearings Division of the Office of Hearings and Appeals attached and that the Union was thereupon under an obligation to participate in order to retain its statutory status to "present information." *Id.*

By way of response, the UMWA points out that, under 30 CFR 81.1–81.6, it filed a certificate of representation, a copy of which was served on Alabama, which lists the following address:

UNITED MINE WORKERS OF AMERICA
900 15th Street, N.W.
Washington, D.C. 20005

The Union admits that service was had on the two local officials named above, but argues that, in order to perfect such service, Alabama was obligated to serve any application for review with respect to the subject mine at the address of the national headquarters listed on the certificate of representation. The Union maintains in substance that inasmuch as service was never so perfected, it was not obligated to participate and its appeal from the decision below cannot be dismissed

[1] There is no provision in our procedural regulations for a response to a statement in opposition to a motion, and Alabama filed its response without permission of the Board. *See* 43 CFR 4.510. We are considering the contents of this response because the UMWA has had an opportunity to file a further statement and the Union has interposed no objection.

on account of any deliberate and persistent failure to do so.

The Certificate of Representation, a copy of which is attached as an appendix to this opinion, p. 413 is composed of two parts, the upper portion being labeled "CERTIFICATE OF REPRESENTATION" and the lower part being headed "GENERAL INFORMATION." The former is addressed to the DIRECTOR, MINING ENFORCEMENT AND SAFETY ADMINISTRATION (MESA), comes from the UMWA at its national headquarters in Washington, D.C. and is notarized. The latter, upon which Alabama relies, advises MESA that if it needs to contact the Union on a matter related to the subject mine, it should do so by communicating with the local safety coordinator at his listed address or phone number.

In our opinion, a reasonable reading of this disputed document is that service of an application for review concerning the subject mine must be had on the UMWA at the listed address of its national headquarters in Washington, D.C. 30 CFR 81.2 and 81.5. The portion labeled "GENERAL INFORMATION" is obviously extrinsic to the certificate inasmuch as the notarization appears in between the two. In addition, the "GENERAL INFORMATION" section is apparently intended for and addressed to MESA rather than the operator. Finally, even if it were reasonable to construe the "GENERAL INFORMATION" section to be a part of the certificate, Alabama is hardly in a position to rely upon it because it served the subject applications for review on persons at addresses which do not appear on the disputed document.

The major purpose of a certificate of representation is to place any interested person on notice of the name and address of the duly authorized representative of miners at the named mine. That such is the purpose becomes readily apparent from the regulations requiring that a copy of such a certificate be kept by MESA in an open, public file, 30 CFR 81.2(b), and that such a copy also be posted by the operator on the mine bulletin board, 30 CFR 81.3. Consistent with the principal purpose of certificates of representation, we are inclined to construe them strictly. Where the representative of miners is entitled to receive notice in order to exercise its rights under the Act, as in the case at hand, such notice must be served upon the person or organization named, at the address listed, in the valid, existing certificate on file. We hold that such service was not accomplished by Alabama on the Union in this case.

[2] Inasmuch as the UMWA was never properly served with the subject applications for review, jurisdiction to render a decision conclusive of the UMWA's rights did not attach.[2] Therefore, the Union was

[2] In view of the fact that the UMWA has appealed to the Board from the decision below, we are of the opinion that the Union has voluntarily submitted to the jurisdiction of the Office of Hearings and Appeals in this case. Consequently, it is unnecessary for Alabama to perfect service following issuance of this opinion.

under no preseut duty to participate and cannot now be dismissed for having failed to do so voluntarily. *Cf.* 43 CFR 4.507(c), *Old Ben Coal Corp., supra*, 4 IBMA 108–110.

Although we are thus denying Alabama's motion to dismiss for the reasons stated above, we nevertheless are not willing at this time to consider the UMWA's assignments of error because such assignments are based upon contentions which the Union did not personally present to Judge Painter. Although we intimate no views with respect to the merits, it may be that the Union can persuade the Judge to change his mind and should have the opportunity to do so. More importantly, we believe that our appellate function would be more rationally exercised, should it be necessary, if we were to have the benefit of Judge Painter's views with regard to the Union's claims.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the subject motion to dismiss IS DENIED, the decision below in the above-captioned dockets IS VACATED, and the case IS REMANDED for further consideration not inconsistent with the foregoing opinion.

DAVID DOANE,
Chief Administrative Judge.
HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

APPENDIX TO OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE, 5 IBMA 100

CERTIFICATE OF REPRESENTATION

To: DIRECTOR, MINING ENFORCEMENT AND SAFETY ADMINISTRATION (BUREAU OF MINES), Department of the Interior, Washington, D.C. 20240

From: UNITED MINE WORKERS OF AMERICA, 900 15th Street, N.W., Washington, D.C. 20005

In accordance with the procedures for identification of representatives of miners at mines under the Federal Coal Mine Health and Safety Act of 1969, this is to advise that the United Mine Workers of America, which is the collective bargaining representative for all the classified employees at the following mine, is the authorized representative of the miners at the mine:

Maxine Mine
Name of Mine or Facility
Rt. 1, Quinton, Ala. 35130
Address of Mine
Alabama By-Products Corporation
Name of Coal Company
01–09322
Bureau of Mines Identification No.

A copy of this Certificate of Representation has been served upon the operator of the above mine.

JEFFERSON COUNTY, ALABAMA
(S)
JOHN S. SULKA,
Executive Safety Director,
United Mine Workers of America

Subscribed and sworn to before me this 1st day of March, 1974.

(S)
Ouida J. Brandon
Notary Public

My commission expires Feb. 21, 1976.

GENERAL INFORMATION

The mine listed above is located in District #20 of the United Mine Workers of America. Should the Mining Enforcement and Safety Administration need to contact the union on any matter concerning the mine, please refer all communications to Howard C. Hillhouse who holds the following position within the union and who can be reached at the address and phone number listed below:

Position: Safety Coordinator.

Address: 211 Acton Avenue, Birmingham, Ala. 35209.

Phone No.: Home 871–8649. Office 322–0886.

UNITED STATES v. THERESA B. ROBINSON

21 IBLA 363

Decided *August 25, 1975*

Appeal from decision of Administrative Law Judge John R. Rampton, Jr., declaring contestee's Howard placer mining claim void.

Affirmed.

1. Administrative Procedure: Burden of Proof—Mining Claims: Contests—Mining Claims: Discovery: Generally—Mining Claims: Locatability of Mineral: Generally

When the Government contest a mining claim and establishes a prima facie case that contestee has not made a discovery of a locatable mineral deposit, the burden devolves on contestee to establish by a preponderance of the evidence that the claim has been validated by the discovery of a locatable mineral deposit.

2. Administrative Procedure: Burden of Proof—Mining Claims: Discovery: Marketability

A bog iron ore deposit does not meet the prudent man—marketability test where the evidence show that contestee could only develop the iron deposit for sale for metallurgical uses after further exploration to establish a higher grade or greater tonnage of ore, or upon future favorable developments in the iron ore market.

3. Mining Claims: Determination of Validity—Mining Claims: Discovery: Generally—Mining Claims: Locatability of Mineral: Generally

Marketability of mineral material is not the sole test of the validity of a mining claim. Profitable sales of mineral material for non-validating uses cannot be used in determining the validity of a mining claim; the claimant must meet the prudent man—marketability test in a market for which the material is locatable.

4. Mining Claims: Determination of Validity—Mining Claims: Locatability of Mineral: Generally—Mining Claims: Specific Mineral Involved: Bog Iron Ore

Bog iron ore, used as a soil conditioner or soil amendment, is not a locatable mineral deposit in the absence of a showing that it meets the test of *United States* v. *Bunkowski*, 5 IBLA 102, 113–16, 79 I.D. 43, 48–49 (1972), *i.e.*, it is found to be not just a physical amendment to the soil but a chemical amendment which alters and improves soil or plant chemistry.

5. Administrative Procedure: Hearings—Regulations: Generally—Rules of Practice: Appeals: Discovery—Rules of Practice: Evidence—Rules of Practice: Witnesses

A motion for remand of a mining claim contest for further hearing on the grounds of prejudicial surprise, based upon Government counsel's failure to supplement interrogatory answers listing witnesses and exhibits as ordered in lieu of prehearing conference, will be denied where contestee's counsel ignored repeated offers of continuance made at various stages of the hearing.

United States v. Barngrover (On Rehearing), 57 I.D. 533 (1942), overruled in part.

APPEARANCES: Charles J. Traylor, Esq., and Richard W. Arnold, Esq., of Traylor, Palo, Cowan & Arnold, Grand Junction, Colorado, for appellant; Rogers N. Robinson, Esq. (at hearing), Richard L. Fowler, Esq., and A. Walter Wise, Esq. (on appeal), Office of the General Counsel, United States Department of Agriculture, Denver, Colorado, for respondent.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

Theresa B. Robinson has appealed from the December 5, 1974, decision of Administrative Law Judge John R. Rampton, Jr., which declared void Mrs. Robinson's Howard placer mining claim, located in section 31, T. 42 N., R. 8 W., N.M.P.M., in Uncompahgre National Forest, Colorado.

The contest began with the filing of a contest complaint on behalf of the Forest Service, Department of Agriculture, which alleged that the Howard placer mining claim was invalid because:

a. No valuable mineral deposit has been discovered within the limits of the claim.

b. The iron oxide within the limits of said mining claim is a common variety material.

[1] In order to have a valid mining claim, the mining claimant must show that he has made a "discovery" of a "valuable mineral deposit." To show a discovery, the claimant must show that he has found minerals in such quantity and quality as engender the belief that:

> * * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. *Womble*, 19 L.D. 455, 457 (1894), approved in *Chrisman* v. *Miller*, 197 U.S. 313, 322 (1905). To show a "valuable mineral deposit" the claimant must show that the deposit at issue is locatable under the mining law, 30 U.S.C. § 22 *et seq.* (1970). *See United States* v. *Bienick*, 14 IBLA 290, 297 (1974) (concurring opinion); *United States* v. *Bunkowski*, 5 IBLA 102, 79 I.D. 43 (1972); *United States* v. *Mattey*, 67 I.D. 63, 65 (1960); *United States* v. *Black*, 64 I.D. 93, 96 (1957); *Gray Trust Co.* (*On Rehearing*), 47 L.D. 18 (1919); *Holman* v. *State of Utah*, 41 L.D. 314 (1912). *Cf United States* v. *Toole*, 224 F. Supp. 440 (D. Mont. 1963).

In *Foster* v. *Seaton*, 271 F. 2d 836, 838 (D.C. Cir. 1959), the Circuit Court approved the Departmental rule that:

> * * * [w]hen the Government contests a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. * * *

This standard of proof is applicable to both issues of fact raised on appeal; in essence it envisages that after contestant has made a prima facie case, contestee bears the risk of

nonpersuasion, *i.e.*, the ultimate burden of proof.

With her timely answer to the contest complaint denying the invalidity of the claim, Theresa B. Robinson (contestee) through counsel moved for a prehearing conference in the case after an opportunity for full discovery. After Judge Dalby, since retired, set the case for hearing, contestee renewed the motion for a prehearing conference. After some continuances, Judge Dalby denied the request for prehearing conference, and ordered contestant to respond to any interrogatories contestee might file in lieu of a prehearing conference.

On November 2, 1972, contestee filed interrogatories asking in relevant part: (1) whether contestant contended that the claim was improperly located; (2) if contestant contended that a discovery pit did not exist on the claim; (3) whether contestant contended that the iron on the claim did not have commercial value; (4) by what theory contestant maintained that the claim had "no valuable mineral deposit;" (5) by what theory contestant maintained the iron was a common variety material; and (6) by what witnesses and documents did contestant intend to prove any or all of the issues set out in the complaint and the interrogatories.

Contestant's response to the first subject of the interrogatories was to move to amend the complaint to charge, in addition, "The claim is not distinctly marked on the ground so that its boundaries can readily be traced." The motion was granted. Contestant also answered: that it did not contend there was no discovery pit; that the meaning of "commercial value" was unclear; that the material on the claim did not fall within the "well-defined meaning [of valuable mineral deposit] under the mining law," and it could not be mined, milled and sold for a reasonable return; and that the material was common within the meaning of the Act of July 23, 1955, 30 U.S.C. § 611 (1970). The only witness listed by contestant was A. F. Klein, Jr., a Forest Service mineral examiner.

About the same time, contestant requested a postponement of the hearing because of the unavailability of a witness other than Mr. Klein. The hearing was re-scheduled with contestee's consent, but the record does not disclose whether contestee understood that the unavailable witness was not Mr. Klein, whom contestant named in responding to the interrogatories, but an expert on soil amendments and conditioners.

In addition, contestant filed interrogatories of contestee, requesting that contestee provide information pertaining to all sales of iron ore from the claim; requesting copies of any assay reports; and the names of witnesses to be called. Contestee's response indicated that contestee's sales records had been lost, enclosed an assay certificate, and listed three certain and three potential witnesses.

Eight days later contestee supplemented her response with the names, addresses and subject matter of the testimony of five more potential witnesses. With the supplemental response, contestee noted that Rule 26, Federal Rules of Civil Procedure, imposes a continuing duty to supplement answers to interrogatories when additional information becomes available, and requested that contestant so inform contestee if new witnesses were to be called.

At the hearing, held in Grand Junction, Colorado, contestant called A. F. Klein, Jr., a Forest Service mineral examiner who twice visited the claim. He took a cut sample and a grab sample which assayed 35.1% and 30.9% iron, respectively (Exs. 5–6). He described the size and nature of the bog iron ore (limonite) deposit on the claim (Tr. 7–9). He testified that greater than 51% ferric oxide content is necessary before an iron deposit has potential value for use in steel-making (Tr. 39), and, over contestee's objection, testified that limonite bog iron deposits occur commonly in the mountains of Colorado (Tr. 44–48).

On cross-examination, Mr. Klein admitted that his opinion that there was no prospect of developing a valuable mine from the deposit was based on the value of the iron ore for paint pigment, steel-making or other industrial uses (Tr. 87–88), rather than its value in agriculture as a soil conditioner (Tr. 87, 68–69).

On redirect examination, Mr. Klein supplemented his prior testimony about how accessible and easy to mine the deposit is (Tr. 70) with cost and return figures on sales for agricultural use taken from contestee that indicated a maximum return of $52 per ton (at $2.60 per hundred pound bag) and hauling costs of $14 per ton (at 10¢ per ton-mile) from the deposit to Grand Junction (Tr. 81–82, 95, 101). He concluded that adding the cost and depreciation of equipment, contestee would be left with only a small profit (Tr. 97–101).

Contestant then called Theresa Robinson, the contestee, as an adverse witness, over objection. She testified that up to 1970, when her late husband's partner left for two years (Tr. 286–287), she sold over a hundred tons at $2.60 per hundred pounds to farmers and nursery owners as an iron supplement for the alkaline soils of western Colorado to prevent iron chlorosis on all types of farm crops and garden plants (Tr. 108–12).

Contestant then called Dr. Ewell A. Rogers, an expert in fruit tree nutrition employed at the Colorado State University Experimental Station. Contestee, on learning that Dr. Rogers had been subpoenaed the day before the hearing, objected to his testimony on the grounds that contestee was not notified he would testify as required by contestant's continuing obligation to supplement the answers to the interrogatories (Tr. 103–05, 122, 132–33). Dr. Rogers testified that his research on

tree fruit indicates that iron oxide applied as a soil conditioner does not help the plant's health, as the iron itself cannot be absorbed by the plant in its natural state. He described iron chelates, compounds in which iron is chemically available to the plant roots, as the only effective soil amendment for chlorosis (Tr. 123–25, 129).

Clyde Jones, chief chemist for the Colorado Department of Agriculture, then testified for contestant over similar objection by contestee. He testified, in his capacity as supervisor of the laboratory that analyzes all fertilizers and soil additives in Colorado, that the iron oxide from the claim should have been, and was not, registered and tested as required by Colorado state law regarding commercial soil amendments (Tr. 134–35, 137–38). He also testified that limonite, no matter what its iron content, was not of any benefit to crops as a soil conditioner (Tr. 139, 142).

Contestant rested, and contestee moved that no prima facie case of invalidity had been made. The Judge ruled that based on *United States* v. *Bunkowski*, *supra*, contestant had presented a prima facie case that the material on the claim was not locatable as a valuable mineral deposit under the mining law. The Judge further offered contestee a continuance either at that point or when she finished presenting her case (Tr. 147).

Contestee called Albert C. Thomas, who runs a retail home supplies (firewood, rock, soil conditioners) business. He testified that he has sold comparable iron oxide material from the Iron Springs claim near the Howard placer claim and has seen its beneficial effects, mainly on flowers (Tr. 151–53). He was certain he could market the material and do so at a profit (Tr. 154, 165). On cross-examination, he indicated that the results occurred in part because the iron rendered the alkaline clay more porous (Tr. 162). He did not know what effect the iron actually had on the alkali itself (Tr. 163).

John I. Schumacher, a registered mining engineer who owns an exploration company and does mineral properties consulting work, described the claim and the locations where he took a cut sample (Ex. D) that assayed 32 percent iron, and a grab sample (Ex. E) that assayed 48 percent iron (Tr. 169–73). He indicated that the deposit could be mined at a comfortable profit (Tr. 180, 190–91), and that enough material could be stockpiled during the summer to sell all year (Tr. 184). He also testified that the spectrographic assays showed the deposit to be more than just limonite (Tr. 175, 188). He said that iron deposits once considered too low-grade for use in steel-making are now economical, including some with as little as 33 percent iron content (Tr. 194–96).

Charley Pinger, a farmer living adjacent to contestee's brother's ranch, where material from the claim was stockpiled, milled, sacked and sold, testified that "many

times" he saw "truckloads" of the iron oxide delivered to the ranch until four or five years ago, and that they did a steady business selling off the stockpile (Tr. 200–02). He testified that contestee's brother revived some dying evergreen trees with material from the claim alone (Tr. 203), and that he himself used it alone (Tr. 207), and "it sure does wonders" (Tr. 203). He was unsure whether the iron ore "will neutralize the acid" or "neutralizes the alkali" (Tr. 203–04), and could only suggest that different soils account for the contestant's experts' results.

Julian D. Utter, a farmer, janitor and gardener for the highway department, testified he could not start a lawn for two years until he used material from the claim (Tr. 208–10). He testified he put in lawns professionally until 1963 on a no lawn-no pay basis and never failed when using iron oxide (Tr. 210–11). He felt that the iron oxide "dissolves the alkali" (Tr. 211, 220). He also cured his two apricot trees of yellowing by using iron oxide alone without any difference in watering (Tr. 212). After ten years working with it he is convinced it works where sulphur and "barnyard" will not (Tr. 214–15). He further testified that vegetables growing in soil to which the iron oxide has been added have iron visibly clinging to the hair roots when pulled (Tr. 216), and that the vigorous growth of such vegetables was due to the plants' using the iron (Tr. 222).

Astor Hurst, a greenhouse-nursery operator, sold "mineral fertilizer" he bought from contestee at $1.80 per 80-pound bag, used it in his greenhouse on plants grown there (Tr. 229), and would not guarantee rose bushes he sold unless they were grown in contestee's iron oxide (Tr. 230). Although he had no chemical explanation for how it worked, he knew it did and relied on it, and knew the material on the claim could be worked and sold at a profit (Tr. 232–33). He and his wife use iron oxide to the exclusion of all other fertilizers and soil amendments in their own garden, on the advice of a naturopath doctor (Tr. 228, 235).

Sid Nichols, who owns and operates Mountain States Tree Service, has used the iron oxide every year he could get it since 1956 because it prevents yellowing, prevents damage during transplanting, and remedies the iron deficiency in Grand Valley soils (Tr. 237–39). He has saved a number of bolleana trees with iron oxide (Tr. 240). Although he could not explain how the iron oxide works, he had recommended it to many who have since used it (Tr. 242).

Paul B. Oyres, who was in the nursery business, used and recommended the use of the Robinsons' iron oxide because it was high in peat moss and humus (Tr. 244), it opens up "tight soil" to let the water percolate down to the roots (Tr. 250), and it cured the yellows, which he blamed on iron deficiency in the soil (Tr. 249).

H. D. Clark, who staked and surveyed the Howard placer mining

claim in 1960, testified that he saw the discovery cut in 1960 (Tr. 253), and that when he visited the claim in late 1972 he located the southeast and southwest corner stakes easily (Tr. 256). He also testified that both 10-acre portions of the claim contained a portion of the deposit.[1]

Counsel then called contestee, who clarified prior testimony referring to the claim at issue as Iron No. 3 lode claim which contestee and her husband located in 1956 on the same deposit (Tr. 264). The locator of the Howard placer claim, who employed Mr. Clark in the survey, deeded the claim to contestee after learning of the prior location on the same deposit (Tr. 263–66). She reiterated the sales figures she gave to mineral examiner Klein during his investigation (Tr. 270–71).

Lyman "Slim" Foster, who was a partner of Mr. Robinson until the latter died in 1960, continued hauling and selling iron oxide from the claim on the same basis with contestee. He testified that the actual sales records were lost between 1970 and 1972 when he had to leave his business in the custody of another (Tr. 279, 286–87). From his experience in mining, hauling and selling this iron oxide he was convinced he could make a profit selling material from the claim (Tr. 281–82, 285).

Amos Bruner testified about an episode in 1961 when newsmen covering a story on nitrogen use in growing corn photographed a corn row 11 feet tall grown in iron oxide-added soil (Ex. M). He hauled iron oxide for Boyd Robinson and never heard anyone complain about the results (Tr. 293–94, 304).

In rebuttal, contestant recalled Clyde Jones, and introduced a spectrographic test of a sample of material from the claim done under a method for determining available iron. Exhibit 9, admitted over contestee's renewed objection that the document was not noticed in contestant's interrogatory answers even though the tests were requested two weeks earlier, showed that the iron oxide ran 0.116 percent on the fertilizer test and 7.6 parts per million on the soil test (Tr. 314). In other words, if the sample ran 30 percent iron, 29-plus percent would be unavailable to the plants (Tr. 315). The sample had two pounds of available iron per ton, below Colorado's statutory standard of five percent minimum available iron (Tr. 316). He testified that chemically, iron and healthy alkali would not react together (Tr. 318), and that Grand Valley soils are not deficient in iron, but deficient in available iron (Tr. 323).

Contestant also recalled Ewell Rogers, who testified that cold water in early spring can cause chlorosis, as can excessive use of "barnyard" fertilizer or nitrogen (Tr. 349). He described in greater detail the laboratory methods by which he determined that iron oxide had no effect on the fruit trees in his experiment, although the iron

[1] Mr. Clark's testimony corroborated the propriety of the Judge's dismissal of paragraph 5(c) of the amended complaint, *viz.*, that the claim was not marked on the ground, which the Judge dismissed at the close of contestant's case (Tr. 148–49).

chelate did (Tr. 352–56). He also testified that while he did not use iron oxide from the Howard claim, there is nothing chemically to distinguish any deposit from another as far as iron uptake in plants is concerned.

In its posthearing brief, contestant argued: (1) that the material was not locatable as the iron does not react in any way in the soil to make the soil more fertile to plants; (2) that, assuming the iron is not locatable as a soil conditioner, the evidence established that the deposit was not valuable as a source of ore for paint pigment, steel-making, or other recognized metallurgical uses of iron; and (3) that the motive for bringing the contest was not at issue. Contestee's brief argued: (1) that the material was locatable as limonite iron ore since the statute does not refer to the use to which an otherwise locatable mineral is put, and, if use is relevant, evidence of a chemical reaction in the soil met the *Bunkowski* test; (2) the prudent man—marketability test was met by the evidence of market demands, past sale prices and profits, and ease of removal; (3) that as a matter of law the deposit was not a "common variety" material within the meaning of the Act of July 23, 1955, 30 U.S.C. § 611 (1970); [2] (4) that the claim was properly located; (5) that contestee was prejudiced by the conduct of Government counsel in ignoring the Judge's prehearing arrangements; and (6) that even if the Howard placer were declared invalid, the Iron No. 3 lode located in 1956 was still subsisting.

In his decision of December 5, 1974, Judge Rampton held: (1) that paragraph 5(c) of the amended complaint was dismissed by stipulation (Tr. 148–49); (2) that contestee did not show by a preponderance of the evidence that the material on the claim could be sold at a profit for any metallurgical use of iron ore; (3) that it is undisputed that the material from the claim has been removed and marketed at a profit; and (4) that contestant's expert witnesses presented "the best and most reliable testimony * * * on the question of the effect of bog iron on soil chemicals and plant growth." (Dec. at 8.) "The testimony that the iron content of the material from the claim is not accessible or absorbed by the plants stands unrebutted." (Dec. at 9.) He, therefore, concluded that the material on the claim did not constitute a valuable mineral deposit locatable under the mining law, and declared the Howard placer mining claim void.

On appeal, contestee sets out three grounds of error: (1) that the bog iron deposit does meet the marketability test when considering metallurgical uses of the iron; (2) that the Judge's finding that the iron is not a locatable mineral when put to agricultural use is erroneous be-

[2] Contestant in its brief to the Judge did not assert the invalidity of the claim on the ground in paragraph 5(b) of the complaint, that the material was a common variety. As the issue was dropped, we make no ruling on it. *See United States* v. *Bunkowski, supra* at 112–13, 79 I.D. at 47–48.

cause the *Bunkowski* case is distinguishable as a matter of law, and because the testimony of contestee's witnesses was erroneously ignored; and (3) that if the Administrative Law Judge's findings are not reversed, the case should be remanded for further proceedings to correct the prejudicial effect of contestant's failure to abide by the continuing obligation to supplement answers to interrogatories when use of new witnesses and documents is planned. Contestant's answer denied and rebutted these three allegations of error.

[2] In arguing that the bog iron deposit meets the prudent man—marketability test for metallurgical uses of iron, contestee points to the testimony that iron ore deposits containing as little as 33 percent iron are being mined for metallurgical use (Tr. 195), and the Howard placer assayed from 32 to 48 percent iron (Tr. 66, 173–74, 185). In addition, contestee points to the nearby Iron Springs claim, sold for $40,000 in 1954, as an indicator of the value of the Howard placer, which has a comparable iron content. Contestee argues that marketability as discussed in *United States* v. *Coleman*, 390 U.S. 599 (1968), "is not the primary factor which can lay aside the [prudent man] test when prudent men would be willing to expend time and money to further develop a mining claim, as they would be in this case." (Appeal brief at 3.)

The facts pointed to do not meet contestee's burden of proof. See *Foster* v. *Seaton*, *supra*. The testimony of Mr. Schumacher only corroborated that of Mr. Klein (Tr. 20, 39, 52), namely, that further exploration and mapping would be necessary in order to establish whether the Howard placer deposit *might have* value as iron ore in the future. He testified (Tr. 185–86):

> * * * It could be conceivable this ore might possibly be even higher grade at a greater depth. It could be conceivable it might be even in the very near future commercial as it exists now, or it might be considerably greater tonnage than is shown by acres and depth. * * *

This Board has held that a discovery is not shown when further exploration is necessary before the feasibility of development can be demonstrated. *United States* v. *Rigg*, 16 IBLA 385 (1974); *United States* v. *Woolsey*, 13 IBLA 120 (1973); *United States* v. *Taylor*, 11 IBLA 119 (1973); *United States* v. *Kelty*, 11 IBLA 38 (1973).

In addition to the testimony that further exploration work could show the deposit to be more valuable, the evidence regarding any market demand for deposits of this quality and quantity of ore is speculative. The date when the deposit might become marketable as iron ore is in the indefinite future, and the record lacks evidence showing the deposit at issue to be comparable in size, location and other characteristics to the deposits of similar grade iron that have recently become marketable. A mineral claimant need not be producing or selling from the mine (*Verrue* v. *United States*, 457 F. 2d 1202 (9th Cir.

1972); *Barrows* v. *Hickel*, 447 F. 2d 80 (9th Cir. 1971)), but there must be an existing demand in a market the claimant has a current reasonable prospect of entering. *United States* v. *Stewart*, 5 IBLA 39, 79 I.D. 27 (1972); *United States* v. *Boyle*, 76 I.D. 318 (1969); *United States* v. *Pierce*, 75 I.D. 270 (1968). We affirm the Administrative Law Judge's conclusion on this issue.

[3] Appellant argues that consideration of the value of the deposit for metallurgical uses is improper in any event because the law does not require her to market the material as metallurgical iron if she can earn a greater profit from sales for other purposes: "the test is not whether the deposit is valuable for metalliferous ore, but whether a prudent man would develop this *mineral* claim."

The Department has held that not all materials that can be removed from the earth and sold at a profit are locatable under the mining laws. More specifically, mineral material suitable for base, fill or comparable uses requiring material of no particular specifications and involving only the transportation of the material from one location to another is not locatable, and even if the material is suitable for other purposes, sales of the material for non-validating uses cannot be considered in determining marketability. *United States* v. *Bienick*, *supra* at 293, 298; *United States* v. *Harenberg*, 11 IBLA 153 (1973); *United States* v. *Barrows*, 76 I.D. 299, 306 (1969), *aff'd*, *Barrows* v. *Hickel*, 447 F. 2d 80 (9th Cir. 1971); *United States* v *Hinde*, A–30634 (July 9, 1968). *See United States* v. *Gunn*, 7 IBLA 237, 79 I.D. 588 (1972); *cf. United States* v. *Lease*, 6 IBLA 11, 79 I.D. 379 (1972).[3]

In *United States* v. *Bunkowski*, *supra*, one issue was whether or not gypsite used as a soil conditioner was locatable under the mining law. Appellant argues that *Bunkowski* is distinguishable because the material involved there was not a mineral. In fact, the Board found that the constituent element for which the gypsite was valued was gypsum, admittedly a mineral which might support a valid discovery. However, the Board examined *the use* to which the gypsite was put in order to determine its locatability.

Thus, sales at a profit notwithstanding, contestee must show that a mineral used as an agricultural soil conditioner is marketable for its standard mineral uses, or else meets the *Bunkowski* test for locatability

[3] In *United States* v. *Barngrover*, *supra* at 534, the Department held: "* * * Consequently under the rule in the *Layman* case * * * any substance found in nature, having sufficient value, to be separated from its situs as part of the earth, to be mined, quarried, or dug for its own sake or its own specific uses is locatable and enterable under the mining laws. * * *" In *United States* v. *Mattey*, *supra* at 66, the Department construed *Barngrover* as holding that "* * * deposits of clay of an exceptional nature may be entered under the mining laws. * * *" *Barngrover*, as can be seen from the quotation above, was not so limited in rationale, but it remains the law as it was construed in *Mattey*. Insofar as it holds that marketability alone, independent of use, governs locatability, it has been overruled *sub silentio* by the cases cited in the text, including *Mattey* and *Bunkowski*.

of materials used in agriculture. We turn now to this latter issue.

[4] In *Bunkowski*, the Board adopted the Bureau of Land Management's ruling that the gypsite was locatable as an agricultural soil amendment because it was not only a physical amendment, altering friability, but a chemical amendment, combining with and removing sodium to improve alkaline soils. The gypsite was thus distinguished from other "minerals" such as rhryolite and blow sand, which only served as physical amendments to soil and have been held non-locatable for such use. *United States* v. *Story*, Idaho C–010171 (August 17, 1960) (rhyolite); *United States* v. *Jaramillo*, A–28533 (February 6, 1961); *Solicitor's Opinion*, M–36295 (August 1, 1955) (blow sand).

The testimony of Clyde Jones and Ewell A. Rogers, recited above, demonstrated that iron ore like that from the Howard placer was not available to plant roots, and did not react with the soil so as to neutralize or remove alkali. Their testimony established that iron is only minimally available to plant roots unless in a chelated state, which the raw iron from contestee's claim was not. In short, their testimony indicated that the iron ore did not chemically improve the alkali soil to which it was added and was not chemically available to the plants.

Contestee's rebuttal testimony was persuasive that her buyer's crop yields and plants' health improved, in some cases dramatically, after addition of the iron ore. However, in some instances the testimony did not establish that it was the iron ore that caused the improvement, rather than a change in watering practices, or the "barnyard" or nitrogen used with it. Further, in other instances the testimony did not establish that the improvements, even where causally connected to the use of iron ore, were not due to the humus content of the material [4] or due to improved friability of the "deadpan" alkali of the region. Paul Oyres, a nurseryman, recommended contestee's iron ore because it was high in humus and opened up tight soil to let water to the roots. Albert Thomas concurred that the iron ore improved friability.

We affirm the Judge's finding that contestant's witnesses' "testimony is the best and most reliable testimony available in the record on the question of the effect of bog iron on soil chemicals and plant growth." (Dec. at 8.) Contestee argues that it was error for the Judge to ignore contestee's testimony and reject their observations of the iron ore's actual effects. As we indicated, the sincerity and credibility of contestee's witnesses is not rejected, and was not rejected by the Judge. (Dec. at 8.) However, their testimony that iron ore worked did not explain how it worked and did not establish by a preponderance of the evidence that the material meets the *Bunkowski*

[4] Humus, or the organic portion of the soil, is, like peat or peat moss, not "mineral" and is thus not locatable under the mining law. *United States* v. *Toole*, 224 F. Supp. 440 (D. Mont. 1963). If humus is the constituent of the bog iron deposit sought by the buyers and of value to the plants, the claim is for this reason invalid.

test for the locatability of minerals used as soil amendments.

[5] Finally, appellant requests that if the Judge's decision is not reversed, the case be remanded for further proceedings on the ground that her case was prejudiced by Government counsel's failure to supplement his interrogatory answers with the names of the expert witnesses. Contestee requests the case be remanded to allow contestee time to secure experts to examine and rebut contestant's experts' testimony, and that the "Hearing Judges" be informed that they have the power to act against prejudicial conduct by counsel practicing before them.

Clyde Jones was contacted two weeks before the hearing (Tr. 139), Ewell Rogers was contacted and subpoenaed the day before the hearing began, and contestee was called as an adverse witness in contestant's case-in-chief without notice.[5] Mr. Jones also prepared Ex. 9, a spectrographic sample indicating the amount of available iron in contestee's raw iron ore, for contestant. On the record counsel for contestant contemplated using Mr. Jones and contestee without notice to contestee. We do not condone Government counsel's uncooperative behavior in this case. The rules of practice of the Department are designed to promote development of a full and complete record and not to sanction use of surprise as a hearing tactic. The interrogatories in this case were ordered in lieu of a prehearing conference, which the Administrative Law Judge is explicitly authorized to conduct. 43 CFR 4.430. The limitations on the Judge's subpoena power should not be employed as a shield against prehearing disclosure, and the discovery authority of the Judge should not be so subverted.[6] Strict compliance with both prescribed and customary procedures by Government counsel

[5] We affirm the Judge's overruling counsel's objection to the use of contestee as an adverse witness (Tr. 105–06). We find such authority in 43 CFR 4.433: "The administrative law judge is vested with general authority to conduct the hearing in an orderly and judicial manner * * *."

[6] We would distinguish the Judges' lack of authority to issue subpoenas *duces tecum* from their authority to allow other forms of discovery. The only explicit limitations on the Administrative Law Judges' "general authority to conduct the hearing in an orderly and judicial manner," 43 CFR 4.433, are a prohibition against the issuance of subpoenas for depositions for discovery purposes, 43 CFR 4.26, 4.433, and 4.452–4, and a prohibition against the issuance of subpoenas *duces tecum*. *Compare* 43 CFR 1850.0–7 (1969) *with* 43 CFR 1850.0–7 (1971). Circular No. 2273, 35 FR 10011 (June 18, 1970), amending 43 CFR 1850.0–7 (1969), revoked the Judges' authority to issue subpoenas *duces tecum* and subpoenas for discovery purposes in public land cases. The Judges exercise such an authority only where explicitly authorized by statute. *E.g.*, section 103(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 813(d) (1970); 43 CFR 4.586.

Except to the extent that contestee requested *copies* of documents to be used in contestant's case, the interrogatories filed were in the nature of prehearing conference inquiries; they were not requests for depositions and they did not require subpoenas. Since the Department's procedures in mining claim cases are governed by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* (1970), *United States* v. *O'Leary*, 63 I.D. 341, 344–45 (1956), the Administrative Law Judges are authorized to "hold conferences" and "dispose of procedural requests." 5 U.S.C. § 556(c) (1970). Orders providing for discovery in lieu of a prehearing conference, like the interrogatories in this case, that do not require the issuance of the prohibited subpoenas, appear to this Board to lie within the Administrative Law Judges' statutory and regulatory authority.

is needed to maintain the quality of justice a citizen rationally expects.

However, contestee's posture is also flawed. While claiming prejudice and surprise, contestee's counsel declined numerous offers of a continuance by the Administrative Law Judge. At the close of Mr. Rogers' initial testimony, counsel was informed of his full right of rebuttal (Tr. 133). Similarly, when the Judge ruled that a prima facie case of non-locatability had been made, he stated:

> Now, it will be up to you now to either present your evidence or ask for a continuance or present your evidence and then ask for a continuance, and if you do ask for one, you'll get it if you feel there has been surprise which precluded you from properly preparing the case. * * *

(Tr. 147). When Exhibit 9 was introduced in rebuttal counsel was offered "full opportunity if it's necessary, even to come back here to go into this more fully, if you so desire." (Tr. 310.) Contestee never took the offered opportunity for a continuance to prepare any expert rebuttal or obtain expert advice for cross-examination.

We conclude that contestee's failure to request a continuance, which was repeatedly offered, precludes assertion of prejudice at this time. Appellant requests now what her counsel declined to request at the appropriate time. A hearing proceeding will not be reopened in the absence of a substantial equitable basis for doing so. *United States* v. *Riesing*, A–30474 (January 18, 1966); *United States* v. *Goehring*, A–29407 (July 2, 1963); *J. C. Nelson*, 64 I.D. 103, 110 (1957). *Cf. United States* v. *Holcomb*, A–31019 (August 21, 1969) (objection on appeal considered waived if not pursued at hearing). Similarly, the Department has rejected assertions on appeal that an issue fully litigated and understood was improperly decided because not explicitly raised by the contest complaint. *United States* v. *Pierce*, *supra* at 275–78; *United States* v. *Humphries*, A–30239 (April 16, 1965). Contestee's objection on the grounds of prejudice was waived at the time when it would properly have been satisfied. The request for remand is thus denied.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.[7]

FREDERICK FISHMAN,
Administrative Judge.

WE CONCUR:

EDWARD W. STUEBING,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

[7] While Judge Lewis agrees with the decision herein insofar as it relates to the material involved, which is bog iron ore, she would not necessarily feel bound by such precedent in the case of a mineral such as vermiculite.

U.S. GOVERNMENT PRINTING OFFICE: 1975

APPEAL OF EVERGREEN ENGINEERING, INC.

IBCA-994-5-73

Decided *September 2, 1975*

Contract No. 53500-CT2-258, Imperial Sand Dunes Road Project, Bureau of Land Management.

Dismissed.

1. Rules of Practice: Appeals: Dismissal—Contracts: Disputes and Remedies: Appeals

Where a contractor has filed an appeal and has failed to file a complaint when often requested to do so over a two year period, the appeal is dismissed for want of prosecution.

APPEARANCES: Mr. Carl L. Bybee, President, Evergreen Engineering, Inc., Tempe, Arizona, for the appellant; Mr. David E. Lofgren, Department Counsel, Portland, Oregon, for the Government.

OPINION BY ADMINISTRATIVE JUDGE VASILOFF

INTERIOR BOARD OF CONTRACT APPEALS

Findings of Fact

This appeal involves a road construction project contract awarded to appellant as the lowest bidder on March 13, 1972, in the amount of $235,206.10. Two modifications increased the contract amount to $300,887.60. Work was completed within the time allowed on or about July 25, 1972. The road was located in Imperial County, California. The contract contained the General Provisions for a construction contract, Standard Form 23-A (October 1969 Edition) (Appeal File Exs. 1, 2, 3).

On April 2, 1973, the contracting officer issued his final decision denying appellant's claim in the amount of $220,525.49 covering 21 separate items (Appeal File Exh. 24). Appellant filed a timely appeal which was docketed with the Board on May 8, 1973. Enclosed with the notice of docketing was a copy of the rules of the Board. Specifically called to appellant's attention was Sec. 4.107 thereof which provides for the filing of a complaint within 30 days after receipt of the docketing. The appellant has failed to file a complaint however, although requested to do so by the Board. To fully understand the efforts made to bring this case to issue, we will undertake to review chronologically the steps taken by the parties. The discussion will be divided into three parts: (1) assignment of claim; (2) interrogatories; and (3) motion to dismiss.

(1) Assignment of Claim

By letter dated September 9, 1974, the Board received a copy of a purported assignment of appellant's claim involved in this appeal from the named assignee, Equip-

594-849—75——28

ment Company. The copy of the assignment was dated October 15, 1973. On October 7, 1974, the Board issued an Order requiring the Government, appellant and the assignee to submit their positions on the validity of the assignment. In its statement regarding the purported assignment dated December 4, 1974, the Government took the position that the assignment should be declared "null and void and ineffective" on the ground that it violates what are known as the Anti-Assignment Acts (31 U.S.C. § 203 and 41 U.S.C. § 15 (1970)). Neither the appellant nor the assignee submitted any information in response to the Board's Order of October 7, 1974. In *Evergreen Engineering, Inc.*, IBCA 994–5–73 (January 14, 1975), 82 I.D. 427, 75–1 BCA par. 11,106, the Board sustained the Government's position to the extent of finding that the assignment is inoperative for purposes of the Board's jurisdiction.

(*2*) *Interrogatories*

Citing a U.S. District Court proceeding in California instituted on February 6, 1973, the Government filed a motion dated August 2, 1973, to defer filing pleadings in this appeal. The plaintiff in the court action was a subcontractor of the appellant on the contract involved in this appeal. The defendants were the Government, the appellant and its surety. Noting that some of the claims involved in the court action appeared to be the same as the claims being made by the appellant in this appeal, the Government motion sought to have the filing of any pleadings deferred until the court proceeding had been concluded and the impact of the litigation on this appeal determined.

By Order dated September 4, 1973, the Board extended the time for the Government to plead. In a letter dated November 2, 1973, the Government advised the Board that the court action had been settled and the suit dismissed. The letter also requested a further extension of time to plead in order to permit the Government to obtain details of the settlement which appeared to cover one of the major claim items in the instant appeal. On the same day the Government wrote appellant requesting details of the settlement. On November 6, 1973, the Board issued an Order granting the Government until November 30, 1973, to file pleadings.

Failing to receive a reply from the appellant the Government filed a motion dated November 30, 1973, for an order (i) authorizing the Government to serve written interrogatories upon appellant, (ii) requiring the appellant to produce and permit inspection of documents, and (iii) extending the time for the Government to file its answer. On December 19, 1973, the Board issued an Order authorizing the Government to submit written interrogatories to appellant and requiring the appellant to respond to such interrogatories within a period of 30 days. The Government was given 30 days to file its answer from the time

the appellant answered the interrogatories. Appellant responded to the Government's motion dated November 30, 1973, by letter dated December 11, 1973. In its response of December 20, 1973, the Government noted that the appellant still had not supplied a copy of the subcontract or a copy of the settlement agreement. By letter dated December 26, 1973, the appellant was advised that because of its apparent willingness to provide the needed information voluntarily, the Government would not proceed with the service of the written interrogatories. The appellant not having furnished the requested information by April 19, 1974, the Government wrote again to appellant on that date requesting the desired information.

On its own initiative the Board wrote the parties on May 21, 1974, requesting that the Government serve the written interrogatories authorized by the Board's Order dated December 19, 1973, and file an answer or take such other action as might be appropriate. On June 17, 1974, the Government filed its written interrogatories. Not hearing from the appellant, the Government filed a motion to dismiss appeal dated August 9, 1974, due to the failure of appellant to respond to the written interrogatories. On August 14, 1974, the Board issued an Order to show cause within 30 days why the appeal should not be dismissed. The appellant wrote the Board under date of September 3, 1974, to state that it never had received the written interrogatories from the Government, and requested that certified mail be used to assure delivery. On September 21, 1974, the Board issued an Order requiring the Government to furnish the Board the postal service return receipts allegedly showing receipt by appellant of the Government's written interrogatories dated June 17, 1974, and the motion to dismiss dated August 9, 1974. By memorandum dated September 27, 1974, the Government supplied the two postal service return receipts. The first receipt bears the signature of the addressee, "Evergreen Engineering" with the initials "CDG" and is dated June 26, 1974. The second receipt bears the signature of "Carl Bybee" with the initials "JSS" and is dated August 13, 1974. To verify that appellant had been receiving copies of the Government's documents filed with the Board, the Board on October 9, 1974, requested the Government by memorandum to supply the postal service return receipt for the motion dated November 30, 1973, which requested authorization for written interrogatories. The Government responded by memorandum dated October 22, 1974, in which it stated that postal receipt in question could not be found. To establish that appellant did receive the Government's motion dated November 30, 1973, however, the Government enclosed copies of two letters received from appellant, each bearing the date of December 11, 1973. In both letters appellant refers to the Gov-

ernment's letter of November 30, 1973, transmitting the Government's motion.

The Board on October 29, 1974, entered an Order dismissing the portion of appellant's claim relating to the information sought by the interrogatories (the hot bituminous concrete claim). The Order was subject to being set aside if appellant supplied the requested information within 30 days after receipt of a copy of the order. *Evergreen Engineering, Inc.*, IBCA-994-5-73 (October 29, 1974), 81 I.D. 615, 74-2 BCA par. 10,905. As there is nothing to indicate that the appellant has furnished the requested information to the Government, the hot bituminous concrete claim is hereby dismissed with prejudice.

(3) Motion to Dismiss

On January 8, 1975, the appellant wrote to the Government stating that it would retain counsel within the next 30 days to proceed with this appeal. No counsel having entered an appearance for the appellant, the Government filed a motion to dismiss appeal for lack of prosecution dated March 14, 1975. The Government in its motion relates appellant's failure to reply to written interrogatories, the attempted assignment to a third party, the failure to ever file a complaint, and the apparent failure of appellant to engage an attorney despite the representations made in appellant's letter dated January 8, 1975. The motion also noted that the Government continues to be prejudiced by appellant's failure to prosecute the appeal. An Order to show cause within 30 days why the appeal should not be dismissed with prejudice was issued by the Board on March 18, 1975. In response to this Order the appellant wrote the Board on April 10, 1975, stating that it was having difficulty raising funds to retain counsel to represent it and asked that the "case not be closed until I can raise the funds to hire legal counsel." The Government filed a motion to dismiss the appeal with prejudice dated May 21, 1975, in which it noted that the appeal had been filed on April 30, 1973, and that in the intervening time the appellant had failed to prosecute the appeal.

On June 12, 1975, the Board received a response to the Government's motion to dismiss the appeal with prejudice from a law firm in Phoenix, Arizona. The attorney for the law firm who signed the response stated that he "would like thirty (30) days in which to review the appropriate documents and the legal issues involved, at which time, if representation is undertaken, a formal notice of appearance will be filed with the Board of Contract Appeals, and the case pursued without undue delay." With no objection from the Government, the Board issued an Order on June 16, 1975, suspending any action on the Government's motion to dismiss the appeal with prejudice for a period of 30 days from date of receipt of the Order by the attorney. To date no appearance has been entered by the

attorney from the Phoenix law firm or by anyone else on behalf of the appellant.

In a memorandum to the Board under date of August 1, 1975, the Government renewed its motion to dismiss the appeal with prejudice noting that the 30-day period had expired with no word from either the appellant or the attorney. The memorandum shows that a copy had been mailed to the Phoenix attorney who had requested an opportunity to review the documents.

Decision

[1] This appeal was docketed on May 8, 1973. Over two years have transpired but no progress has been made on the prosecution of the appeal. Although two published decisions have already been issued, the appellant has yet to even file a complaint detailing the 21 separate items in its claim. Appellant has failed to cooperate in discovery proceedings, thereby causing the Board to issue an Order dismissing the portion of its claim relating to the discovery request.

Recognizing that appellant has not been represented by counsel, the Board has given the appellant a considerable amount of leeway in proceeding with the prosecution of this appeal. The appellant has been furnished a copy of the Board's rules which clearly show that it is not necessary for the appellant to retain counsel in order to proceed with the appeal. Appellant may represent itself through its president, the official who has been corresponding with the Board and the Government since the appeal has been docketed. The Board's rules, Sec. 4.107 (43 CFR 4.107) provide that a complaint shall be filed within 30 days after receipt of notice of docketing of the appeal. It has been over two years since the appeal has been docketed. The record shows that the appellant has (i) ignored deadlines established in Board orders (ii) refused to answer interrogatories (iii) made representations concerning receipt of documents which are contradicted by the evidence of records, and (iv) stated that it would retain counsel and then failed to do so.

Based upon the record made in these proceedings, we conclude that the Board should not continue to entertain the instant appeal. The appeal is therefore dismissed without prejudice for failure to prosecute. The dismissal shall be deemed to be with prejudice, however, should the appellant fail to file a complaint with the Board within 45 days after receipt of a copy of this decision.[1]

KARL S. VASILOFF,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW
Chief Administrative Judge.

[1] See *Metametrics Corporation*, IBCA-1012-12-73 (November 12, 1974), 81 I.D. 645, 74-2 BCA par. 10,931; *Henkle and Company*, IBCA-212 (September 15, 1959), 59-2 BCA par. 2331; *Parker-Schram Company*, IBCA-119 (January 28, 1959), 59-1 BCA par. 2058.

JOHN C. BRIGGS

22 IBLA 8

Decided *September 4, 1975*

Appeal from the decision of the Alaska State Office, Bureau of Land Management, ordering appellant to relinquish a portion of the lands applied for in his additional homestead entry application AA-3028.

Set aside and remanded.

1. Additional Homesteads—Alaska: Homesteads

The land in an additional homestead entry application under the Act of April 28, 1904, *as amended*, 43 U.S.C. § 213 (1970), must be contiguous to the applicant's original homestead. Neither that Act nor regulations issued thereunder require that tracts of lands in such an additional entry application be contiguous to each other. The requirement of 43 CFR 2567.1 (c) that land in a homestead entry application in Alaska must be in a contiguous body is maintained by the fact that the land in the additional entry must be contiguous to the original homestead.

APPEARANCES: John C. Briggs, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

INTERIOR BOARD OF LAND APPEALS

On July 15, 1968, John C. Briggs filed additional homestead entry application AA-3028 in the Alaska State Office, Bureau of Land Management. The application was for two separate tracts totaling 40 acres as an additional entry under sec. 2 of the Act of April 28, 1904 (33 Stat. 527), *as amended*, 43 U.S.C. § 213 (1970). The tracts are not contiguous to each other, but each adjoins the applicant's patented homestead entry. The State Office informed appellant in a decision dated April 7, 1975, that unless he relinquished one or the other of the two tracts, his application would be rejected and his claim canceled. Appellant appeals from that decision.

The State Office decision stated that appellant "filed application to enter 40 acres of surveyed lands under the act of May 14, 1898 (30 Stat. 409; 43 U.S.C. 161 (1970))."[1] The decision then quoted 43 CFR 2567.1(c) which requires that lands applied for in a homestead application in Alaska "must be contiguous." Therefore, the decision concluded, appellant must relinquish one or the other of the tracts.

Appellant points out that he has received patent to his original homestead of 120 acres. He acknowledges that he has not applied for tracts contiguous with each other. However, he states that each of the two tracts in his application is contiguous to his original homestead. He argues that "it is obvious that the intent of the regulation is being fulfilled." We agree with appellant

[1] Sec. 1 of the Act of May 14, 1898, 30 Stat. 409, now codified as 43 U.S.C. § 270 (1970), applies the homestead laws of the United States to Alaska, including 43 U.S.C. §§ 161, 213 (1970). See the discussion, *infra*.

that the State Office decision was in error.

[1] In its decision the State Office stated, as quoted above, that appellant was applying to enter land under 43 U.S.C. § 161 (1970). That statute is the general homestead law authorizing entry of unappropriated public lands. 43 CFR 2567.1(c) is a regulation applicable to homestead entries under 43 U.S.C. § 161 (1970) for land in Alaska. *See* 43 U.S.C. § 270 (1970). However, appellant clearly stated on his application, as required by 43 CFR 2512.2 (b), that he was applying for an additional homestead entry under the Act of April 28, 1904 (43 U.S.C. § 213 (1970)). Therefore, the requirements of 43 CFR 2567.1(c) that the land in a homestead application must be in a contiguous body should be applied within the purpose and requirements of 43 U.S.C. § 213 (1970) and regulations issued thereunder.

Applications for additional homestead entries in Alaska under 43 U.S.C. § 213 (1970) are governed by 43 CFR 2567.4(c), which states in part:

> (c) *Additional entries.* Any person otherwise qualified who has made final proof on an entry for less than 160 acres may make an additional entry for contiguous land under the act of April 28, 1904 * * * for such area as when added to the area previously entered will not exceed 160 acres. The requirements in connection with such entries are set forth in * * * [§] 2512.2 of this chapter. * * *

The meaning of the words "contiguous land" in the above regulation becomes evident from the first paragraph of 43 U.S.C. § 213 (1970):

> Any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land, may enter *other and additional land lying contiguous to the original entry* which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres. [Italics added.]

43 CFR 2512.2(b), referred to in 43 CFR 2567.4(c), *supra*, repeats verbatim the emphasized portion of the above statute.

The purpose of 43 U.S.C. § 213 (1970) is to allow homestead settlers to obtain the full 160 acres they would have been allowed in their original homestead entry applications. The requirement in 43 CFR 2567.1(c) that the lands applied for in a homestead application be contiguous is maintained by the requirement that the additional entry lands be contiguous to the original homestead. The end result, as in the case before us, is a 160-acre contiguous body of land. Where such a result is obtained and an application otherwise meets description requirements, we see no prohibition in the law or regulations against an additional entry consisting of two tracts both contiguous to the original entry, but not to each other.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further con-

sideration consistent with this opinion.

JOAN B. THOMPSON,
Administrative Judge.

WE CONCUR:

DOUGLAS E. HENRIQUES,
Administrative Judge.

ANNE POINDEXTER LEWIS,
Administrative Judge.

IN THE MATTER OF DANIEL HENSLER

5 IBMA 115

Decided *September 12, 1975*

Certified Interlocutory Ruling.

1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Jurisdiction

The Secretary of the Interior has jurisdiction to assess a civil penalty under sec. 109(c) of the Act, 30 U.S.C. §819(c) (1970), and such penalty is not criminal in nature.

APPEARANCES: William A. Gershuny, Esq., for respondent, Daniel Hensler; Thomas A. Mascolino, Esq., Assistant Solicitor, W. Michael Hackett, Esq., Trial Attorney, for petitioner, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Pursuant to 43 CFR 4.591, Chief Administrative Law Judge Luoma has certified to the Board his ruling in the above-captioned docket denying in part respondent Daniel Hensler's prehearing motion to dismiss for want of jurisdiction. Specifically, he ruled that the Secretary of the Interior has jurisdiction to assess a civil penalty under subsection (c) of sec. 109 of the Federal Coal Mine Health and Safety Act of 1969 over respondent's objection that such a penalty is criminal in nature and thus may only be imposed by invoking judicial power. 30 U.S.C. § 819(c) (1970). For the reasons set forth below, we affirm.

Procedural and Factual Background

On May 1, 1975, pursuant to 43 CFR 4.540, the Mining Enforcement and Safety Administration (MESA) filed with the Hearings Division a petition for assessment of civil penalty against respondent in accordance with subsection (c) of sec. 109 of the Act. MESA alleged in substance that, on July 18, 1974, respondent knowingly authorized, ordered and carried out violations of subsecs. (a) and (c) of sec. 313 of the Act. 30 U.S.C. § 873 (a) (1970), 30 CFR 75.1300; 30 U.S.C. § 873(c) (1970), 30 CFR 75.-1303. Such violations were alleged to have occurred at the Meigs No. 2 Mine of the Southern Ohio Coal Company where respondent is employed as a section foreman.

On June 12, 1975, respondent answered, stating a number of defenses and praying that MESA's petition

be dismissed, or in the alternative, that no penalties be assessed.

Subsequently, on July 16, 1975, respondent filed a motion to dismiss, listing a number of grounds therefor, including the contention in substance that the penalties sought were criminal in nature and consequently not assessable by the Secretary. MESA filed a statement in opposition on July 28, 1975.

By order dated August 1, 1975, the Chief Administrative Law Judge denied the subject motion in part, ruling that he had jurisdiction over a sec. 109(c) civil penalty proceeding and that the penalty being sought was not criminal in nature. He then certified his ruling to the Board pursuant to 43 CFR 4.591.

Finding that the subject ruling involved a controlling question of law the resolution of which may materially advance ultimate disposition of the subject proceeding, we agreed to undertake review in an order issued August 6, 1975. In the interest of expeditious handling, we scheduled oral argument for August 15, 1975, and dispensed with the requirement of filing prehearing briefs. Oral argument before the undersigned panel took place as scheduled.

Issue on Appeal

Whether the Chief Administrative Law Judge correctly ruled that the Secretary of the Interior has jurisdiction to assess a civil penalty under sec. 109(c) of the Act over respondent's objection that such a penalty is criminal in nature.

Discussion

[1] Subsection (c) of section 109 of the Act incorporates by reference the sanctions provided for under subsecs. (a) and (b), but is silent with respect to the question of whether the former may be imposed administratively by the Secretary.[1] Respondent contends that, despite the appellation "civil," the penalty is criminal in nature, and that therefore it may only be imposed by invoking judicial power. Insofar as we are concerned, the issue presented is strictly a matter of statutory construction.

We begin our analysis by rejecting the argument that the term "civil" can or should be ignored. It is settled that when the Congress has characterized a monetary penalty assessment as "civil," such characterization must be taken at face value where the only consequence of an adverse judgment is liability to pay a sum of money. *See United States* v. *J. B. Williams Co., Inc.*, 498 F. 2d 414, 421 (2d Cir. 1974). With respect to a proceeding for assessment of civil penalty under

[1] Subsection (c) of sec. 109 of the Act provides as follows:

"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 110(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section."

subsec. (c) of sec. 109, the result in a case where the Government prevails is simply a money judgment. By contrast, there is neither the stigma of "conviction" nor the disabilities associated with establishment of a criminal record which accompany a similar kind of judgment in a criminal proceeding brought under the same subsection.[2] It follows accordingly that the subject penalty provision is, as characterized, strictly civil and not criminal in nature.

On the foregoing basis alone, we would affirm the Chief Administrative Law Judge's ruling, but there are still other reasons which lend support to our conclusion that when the Congress used the term "civil," it did so purposefully.

With regard to civil monetary penalties in other statutes which, like those under our Act, are designed for the regulatory purpose of enforcing observance of and compliance with legislative policies and rules, we observe that the federal appellate courts have uniformly upheld their validity as a matter of constitutional law as against contentions that such penalties were criminal in nature. *See, e.g., Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320 (1909); *Helvering* v. *Mitchell*, 303 U.S. 391 (1938); *United States* v. *J. B. Williams Co., Inc., supra; American Smelting and Refining Co.* v. *OSHRC*, 501 F. 2d 504 (8th Cir. 1974); and *Frank Irey, Jr., Inc.* v. *OSHRC*, — F. 2d —, 1974–1975 OSHD par. 18,927 (3d Cir., No. 73–1765, Nov. 4, 1974), *aff'd on rehearing en banc*, — F. 2d —, 1975–1976 OSHD par. 19,876 (July 24, 1975). Indeed, it is noteworthy that all of these cases, except *Helvering* v. *Mitchell*, *supra*, deal with civil penalties possessing a substantial identity of purpose, namely, deterrence of noncompliance with legislative rules designed in some measure to prevent the occurrence of health and safety hazards. Moreover, in all of these cases, except *United States* v. *J. B. Williams Co., Inc.*, *supra*, the penalties in question were administratively imposed. The civil penalty provision here under analysis comes squarely within this line of cases and cannot, in our opinion, be significantly distinguished.[3]

In opposition to this line of reasoning, respondent makes several arguments based on his reading of the statutory language and two federal cases, namely, *United States* v. *Le-Beouf Bros. Towing Co., Inc.*, 377 F. Supp. 558 (E.D. La. 1974), *appeal pending*, 5th Cir., No. 74–3140, and *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144 (1963). He also com-

[2] Respondent suggests that the real motive behind the civil penalty provision of sec. 109 (c) is to impose a punishment without having to comply with the procedural requirements for a criminal prosecution. We think that this suggestion amounts to pejorative conjecture unrelated to any objective aspects of the language of the Act or the legislative history. *See Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960).

[3] We observe in passing that the maximum civil penalty allowable under sec. 109(c) is $10,000 which is well within the range of similar such penalties which have been held to be civil. *See, e.g., Helvering* v. *Mitchell, supra; United States ex rel. Marcus* v. *Hess*, 317 U.S. 537 (1943); *United States* v. *J. B. Williams Co., Inc., supra* at 418, n. 1; and *Frank Irey, Jr., Inc.* v. *OSHRC, supra.*

plains particularly of the denial of a trial by jury and the impact of the subject proceeding on any subsequent criminal case.

Respondent would have us find significance in the fact that several of the criteria required to be considered under subsection (a) of sec. 109 are plainly irrelevant to any individual who might be assessed a civil penalty pursuant to subsec. (c) thereof. The criteria required to be considered under subsection (a) are: (1) history of previous violations, (2) appropriateness of such penalty to the size of the business, (3) negligence, (4) effect on the operator's ability to continue in business, (5) gravity of the violation, and (6) demonstrated good faith in achieving rapid compliance after notification of a violation. Of these, only the second and fourth are irrelevant. We find this argument unpersuasive because these criteria do not constitute a description of the coverage of subsections (a) or (c) of sec. 109, as would be the case, if they were, instead, elements of a *prima facie* case.

Respondent further points out that sec. 109(c) requires proof by the Government that a person charged thereunder committed the acts alleged "knowingly" and maintains that such requirement conclusively reveals a purely punitive legislative purpose. We reject this claim by noting that in an instance where knowledge was an element in an action for a civil monetary penalty in a statutory scheme providing for both civil and criminal sanctions for the same behavior, such penalty was held by the Supreme Court to be civil over the objection that it was criminal in nature. *U.S. ex rel. Marcus* v. *Hess*, *supra* (cited at n. 3).

Respondent principally relies upon the *LeBeouf* decision cited above. In that case, a federal district court construed two contiguous provisions of the Federal Water Pollution Control Act, namely, 33 U.S.C.A. § 1161 (b) (4) and (b) (5) (1970). The former mandates compulsory notification to the Coast Guard upon an unlawful discharge of oil into or upon the navigable waters of the United States and makes failure to comply subject to penal sanctions. It also provides that "* * * Notification * * * or information obtained by exploitation of such notification shall not be used in any *criminal case*, except a prosecution for perjury or for giving a false statement." (Italics added.) Subsec. (b) (5) provides for administrative imposition of a civil penalty of not more than $10,000 for the discharge of oil which occurs knowingly. Our reading of the court's opinion leaves us in some doubt as to whether it stands for a statutory holding or a constitutional proposition of law. However, in light of the prevailing practice in federal courts against deciding constitutional issues where an alternative basis for conclusive disposition exists, we are of the opinion that the court held only that a civil penalty action brought under 33 U.S.C.A. § 1161(b) (5) is

a "criminal case" within the meaning of the above-quoted use immunity provision of 33 U.S.C.A. § 1161 (b) (4). Given that holding, we find *LeBeouf* to be completely distinguishable because the penalty being sought here is not an outgrowth of compulsory self-disclosure mandated by the Act.

Secondarily, respondent relies upon the Supreme Court's decision in *Kennedy* v. *Mendoza-Martinez*, *supra*. There, it was held that forfeiture of citizenship for the offense of leaving or remaining outside the country to evade military service is a punishment which cannot be imposed consistent with the Fifth and Sixth Amendments to the Constitution without a prior criminal trial. The Court weighed a number of factors in reaching a determination as to whether the sanction in question, which was not labeled "civil," was regulatory or penal in nature; however, we need not go through a similar analysis here because, unlike the statute construed in *Kennedy*, the congressional intent and the language of the Act are entirely clear and the sanction authorized is purely monetary. *See Frank Irey, Jr., Inc.* v. *OSHRC*, *supra* at —.

Finally, respondent complains particularly of the denial of an opportunity for trial by jury and of the impact any testimony given in administrative proceedings might have on a subsequent criminal case growing out of the same incidents which are the subject of the instant petition for assessment. With respect to the former objection, we observe that if the Government is successful in the subject administrative action, respondent may still demand a jury trial with respect to issues of fact in the appropriate district court of the United States if he refuses to pay the administrative assessment and a collection action is filed under sec. 109(a)(4). 30 U.S.C. § 819(a)(4) (1970). Moreover, with respect to the latter objection, although the Government may be taking certain litigating risks with regard to any criminal action it may contemplate bringing, such risks are irrelevant to a determination as to whether the Secretary has jurisdiction to assess a civil penalty in advance of any prosecution under sec. 109(c).

To sum up, we conclude that the assessment of a civil penalty under sec. 109(c) does not constitute the imposition of a sanction which is penal in nature. Accordingly, we are affirming the ruling of the Chief Administrative Law Judge sustaining the Secretary's jurisdiction in the case at hand.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the ruling in the above-captioned docket certified to the Board IS AFFIRMED.

DAVID DOANE,
Chief Administrative Judge.

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

JAMES R. RICHARDS,
Ex-officio Member of the Board,
Director.
Office of Hearings and Appeals.

AFFINITY MINING COMPANY

5 IBMA 126

Decided *September 15, 1975*

Appeal by the United Mine Workers of America from an order by Administrative Law Judge Richard C. Steffey (Docket No. HOPE 75-719), dated May 15, 1975, granting a Mining Enforcement and Safety Administration motion to dismiss UMWA's Application for Review of a section 104(b) Modification Notice pursuant to section 105 of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine and Health and Safety Act of 1969: Review of Notices and Orders: Dismissal of Applications

An Application for Review of a Notice modifying an earlier Notice of Violation issued pursuant to sec. 104(b) of the Act should be dismissed where the condition cited in the earlier Notice has been fully abated and a Notice of Termination issued.

APPEARANCES: Steven B. Jacobson, Esq., for appellant, United Mine Workers of America; and James R. Kyper, for appellee, Affinity Mining Company. Mining Enforcement and Safety Administration did not participate in this appeal.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On December 20, 1974, a Mining Enforcement and Safety Administration (MESA) inspector issued Notice of Violation No. 1 JJP to Affinity Mining Company (Affinity) after an inspection of its Keystone No. 5 Mine in Affinity, West Virginia. This Notice stated that a refuse pile was impeding drainage or impounding water at two locations. Affinity was given until February 5, 1975, to abate the alleged violation of 30 CFR 77.215. On February 13, 1975, Modification Notice No. 1 JJP was issued, and it stated that one portion of the refuse pile impeding drainage had been removed and gave Affinity until February 27, 1975, to submit design criteria for a diversion ditch to the MESA district manager. On February 20, 1975, Modification Notice No. 1 JJP was issued deleting the requirement of submission of design criteria for the diversion ditch and requiring abatement of the condition cited in the December Notice by February 27, 1975. On March 7, 1975, the MESA inspector issued Notice of Termination No. 1 JJP after finding that the cited condi-

tion was fully abated. On March 24, 1975, the United Mine Workers of America filed an Application for Review of the February 20 Modification Notice.

On April 8, 1975, MESA filed a motion to dismiss the Application, in which Affinity joined on May 8, 1975. On May 15, 1975, the Administrative Law Judge (Judge), relying on the Board's decision in *Freeman Coal Mining Corporation*, 1 IBMA 1, 77 I.D. 149, 1971–1973 OSHD par. 15,367 (1970), held that where the violation alleged in a notice of violation has been found by MESA to have been abated, an Application for Review of a modification of such notice must be dismissed.

In its brief on appeal, UMWA contends that the Judge erred in dismissing its Application for Review. Although UMWA raises several issues in its brief, the key issue is that stated above. Affinity filed a brief in which it urged the Board to affirm the Judge's order.

Issue Presented

Whether the Judge erred in dismissing an Application for Review of a Notice modifying an earlier Notice of Violation where the violation alleged is found to be fully abated by MESA prior to the filing of the Application.

Discussion

In *Freeman Coal Mining Corporation*, *supra* at 14–15, the Board held:

> * * * Thus, unless a withdrawal order has issued, or unless there are issues pending before the Board relating to an application by the Bureau for the assessment of a penalty, we think that a pending proceeding to review a section 104(b) notice should be dismissed when the Bureau makes an unequivocal finding that the violation has been totally abated. (Footnote omitted.)

[1] Subsequently, in *Reliable Coal Corporation*, 1 IBMA 50, 78 I.D. 199, 1971–1973 OSHD par. 15,368 (1971), we held:

> * * * that where the Bureau finds a violation charged in a notice issued under section 104 (b) or (i) of the Act to be totally abated, an application to review such notice under section 105(a) is subject to dismissal.

We are of the opinion that our holdings in these decisions are dispositive of this appeal. UMWA is seeking review of a Notice which modifies an earlier Notice. It is limiting its application to the issue of whether the modification which altered the requirements for abatement was reasonable. In the period between the issuance of the Notice and UMWA's Application, Affinity complied with the requirements of the February 20 Modification Notice and abated the alleged violation. Since section 105(a) of the Act allows the representative of miners to seek review of a sec. 104(b) notice only if he believes the period of time fixed for abatement to be unreasonable and consistent with our holdings in *Freeman* and *Reliable*, *supra*, UMWA's application is rendered moot by MESA's finding that the alleged violation had been totally abated.

As we stated in *Freeman*, *supra* at 13, "[w]e do not understand the Secretary's delegation to the Board to confer upon the Board general supervisory authority over the entire spectrum of the Bureau's enforcement practices and policies." * * * If we were to agree with the position of UMWA, we would be contravening the above statement by permitting the Office of Hearings and Appeals to decree what MESA should or should not require for abatement of a violation.

Based upon the foregoing, we conclude that UMWA's Application for Review was properly dismissed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's order in the above-captioned case IS AFFIRMED.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

ZEIGLER COAL COMPANY

5 IBMA 132

Decided *September 19, 1975*

Appeals by the Mining Enforcement and Safety Administration (hereinafter MESA) and Zeigler Coal Company (Zeigler) from an initial decision dated June 24, 1975, by Administrative Law Judge Paul Merlin (Judge), in consolidated Docket Nos. BARB 75-611 and BARB 75-650-P-1 granting Zeigler's application for review of an Order of Withdrawal issued under section 104(a) of the Federal Coal Mine Health and Safety Act of 1969 and assessing civil penalties of $600 for violations of mandatory safety standards.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Closure Orders: Imminent Danger

In an application for review of a sec. 104 (a) order, the order is properly vacated where the conditions cited therein constitute violations of the operator's roof control plan, but fail to show the roof to be unsafe or inadequately supported.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Roof Control

Individual provisions of a roof control plan, once adopted and approved by the Secretary are enforceable as mandatory standards as to the particular mine for which the plan was approved.

3. Federal Coal Mine Health and Safety Act of 1969: Penalties: Mitigation

The amounts assessed as civil penalties will not be disturbed where it appears that an Administrative Law Judge has given weight to evidence of economic losses suffered as a result of a vacated withdrawal order.

APPEARANCES: David L. Baskin, Esq., and Thomas A. Mascolino, Esq., Assistant Solicitor, for appellant, Min-

ing Enforcement and Safety Administration; J. Halbert Woods, Esq., for appellee, Zeigler Coal Company.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

On December 13, 1974, a MESA inspector issued the following section 104(a) withdrawal order [1] affecting the No. 4 unit working section of Zeigler Coal Company's No. 9 Mine, in Madisonville, Kentucky:

Violations of 75.200 and 75.1725(a) existed on No. 4 unit, east rooms, No. 2 south, 1 main west: The approved roof control plan was not being followed in that the torque on the first and one out of every four roof bolts installed thereafter were not checked immediately after each bolt to be tested was installed in No. 1 room. An additional supply of 20 roof bolts, at least 12 inches longer than the 42 inch bolt length used was not provided at the dumping point or inby. Two temporary supports were not kept in the face areas of any of the seven active working places. The results of the spot checks on torques, on a daily basis, were not being satisfactorily recorded in the onshift examination book, in that for some shifts the number of bolts tested was not recorded, for some shifts the number of bolts above and below the required average was not recorded, and for at least one shift, neither were recorded (75.200); the torque valves on both roof bolting machines, Nos. 2-0555 and Serial No. 25 B-149, were inoperative, and the brakes on the roof bolting machine, Serial No. 25 B-149, were inoperative, and the machine had not been removed from service (75.1725(a)).[2]

On December 17, 1974, the operator had corrected the above defects and the inspector issued an order modifying the withdrawal order and permitting production to resume.

On December 19, 1974, the inspector terminated the order when he found that the operator was in compliance with the approved roof control plan and the persons involved had been made aware of the plan's provisions.

On April 14, 1975, the civil penalty proceeding was consolidated with the Application for Review and a hearing on the merits was held on April 16, in Arlington, Virginia.

Finding no conflict in the record with respect to the existence of the conditions cited in the order, the Judge considered each condition in turn. He found that the failure to make and record

[1] Pursuant to the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801-960 (1970).

[2] 30 CFR 75.200 provides in relevant part:

"Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form * * *."

30 CFR 75.1725(a) provides:

§ 75.1725 *Machinery and equipment; operation and maintenance.*

"(a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

torque checks left the operator without the principal means of ascertaining whether the roof was adequately supported; that the frozen torque valves on the roof bolting machines would result in the installation of improperly torqued roof bolts; and that the absence of extra long roof bolts and temporary supports could result in inadequately supported roof in the event of adverse roof conditions. However, since the record showed the roof in the subject area to be in good condition, the Judge concluded that the departures from the roof control plan, though serious violations, did not, either singly or in concert, constitute an imminent danger. The Judge also found the defective brakes on the roof bolting machine to be a serious violation but not one which constituted, or in any way contributed to an imminent danger situation. He assessed a total of $400 for four roof control violations, $100 for the frozen torque valves, and $100 for defective brakes on the roof bolting machine.

Contentions of the Parties

MESA contends that the Judge failed to take into account the risk which was present prior to and during abatement, and therefore erroneously reached the conclusion that no imminent danger existed. MESA asserts that the risk was that no adequacy-of-support information was available for an area of 420 feet by 180 feet (the area affected by the order).

MESA asserts further that, in the event the order is found to have been properly issued, larger monetary penalties than those imposed by the Judge must be assessed. However, if the order were found to have been properly vacated, MESA would not challenge the amount assessed.

Zeigler, though conceding infractions of the roof control plan, contends that the Judge correctly determined that no imminent danger existed.

Zeigler, as cross-appellant, contends that provisions in roof control plans which go beyond the requirements of the statute are not enforceable as mandatory health or safety standards.

Zeigler further contends that the amount assessed by the Judge may have been excessive in view of the operator's lost production between issuance and termination of the order.

Issues on Appeal

Whether the Judge erred in concluding that an imminent danger did not exist.

Whether provisions in a roof control plan are enforceable as mandatory standards.

Whether the Judge properly considered mitigating factors in assessing penalties.

Discussion

[1] The record establishes several instances of the operator's

failure to adhere to its roof control plan but is devoid of any indication of cracked, drummy, or otherwise unsupported or defective roof in the subject area. It shows on the contrary that the roof was in good condition. MESA's argument essentially equates the risk that an unsupported roof might not be detected with the probability that a roof fall might occur at any moment. This reasoning assumes the existence of a danger (undetected, unstable roof) not established by the facts of record. It is obvious from the record that the operator has displayed a negligent disregard of its roof control plan. Serious roof control violations occurred which created a potentially dangerous situation in that the operator might be unaware of, or unable to detect an unsupported roof. However, we must conclude, as did the Judge, that the roof control violations, either singly or in concert, were not such that their existence could reasonably be expected to cause death or serious physical harm before they could be abated.[3] On the facts of this record, the potential for a roof fall was too speculative and remote to warrant the issuance of an imminent danger withdrawal order.

[2] Zeigler does not allege what provisions in its roof control plan are beyond the statute, nor does it suggest that any of the conditions cited in the subject order as violations of 30 CFR 75.200 were not part of its approved roof control plan. In view of *Zeigler Coal Company*, 2 IBMA 216, 80 I.D. 626, 1973–1974 OSHD par. 16,608 (1973), and *North American Coal Corporation*, 3 IBMA 93, 81 I.D. 204, 1973–1974 OSHD par. 17,658 (1974), where we held that the provisions of roof control plans were enforceable as mandatory standards, we find this portion of Zeigler's argument to be without merit.

[3] At the hearing, Zeigler's witness indicated that the operator lost six production shifts, amounting to $2,300[4] between issuance and termination of the order. This witness could not explain the delay of several days before the operator summoned a MESA inspector to terminate the withdrawal order. In assessing penalties the Judge duly considered the figures furnished by Zeigler as well as the fact that the subject section of the mine was idled by the withdrawal order. He concluded that only moderate penalties were warranted even though he found the violations were serious and resulted from negligence.

The Board finds that no reason has been shown why the findings of fact, conclusions of law and decision of the Judge should not be affirmed with respect to the assessment of penalties.

[3] *Freeman Coal Mining Corp.*, 2 IBMA 197, 212, 80 I.D. 610, 1973–1974 OSHD par. 16,567 (1973), *aff'd sub nom Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals*, 504 F. 2d 741 (7th Cir. 1974).

[4] Zeigler's brief lists $21,000 in economic losses due to the shutdown but fails to explain this figure.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's Decision and Order of June 24, 1975, IS AFFIRMED and that Zeigler pay the total assessment of $600 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, Jr.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

PEGGS RUN COAL COMPANY, INC.

5 IBMA 144

Decided *September 22, 1975*

Appeal by Peggs Run Coal Company, Inc. from a decision by Administrative Law Judge Joseph B. Kennedy (Docket No. PITT 75-252-P) dated January 13, 1975, assessing civil monetary penalties in the amount of $2,025, for ten violations of mandatory safety standards set forth in certain regulations promulgated pursuant to the Federal Coal Mine Health and Safety Act of 1969.

Affirmed as modified.

1. Federal Coal Mine Health and Safety Act of 1969: Penalties: Admissibility of Previous Violations

Only those violations charged prior to those in issue, and for which penalties have been paid, settled by compromise, or finally ordered to be paid by the Department, are admissible as evidence in considering an operator's history of previous violations.

APPEARANCES: Richard V. Backley, Esq., and Robert J. Araujo, Esq., for appellee, Mining Enforcement and Safety Administration; John R. Carfley, Esq., for appellant, Peggs Run Coal Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Background

This appeal by Peggs Run Coal Company (Peggs Run), involves a challenge to 10 alleged violations and assessments of penalties made under the Federal Coal Mine Health and Safety Act of 1969 [1] (hereinafter the Act) charged in 10 notices of violation occurring in the Peggs Run No. 2 Mine, Shippingport, Beaver County, Pennsylvania. A total penalty of $2,025 was assessed by the Administrative Law Judge (Judge) for the alleged violations.

Eight of the violations under review are uncontested as to the fact of violation, but are challenged on the ground of insufficient evidence to support findings by the Judge with respect to one or more of the

[1] 30 U.S.C. §§ 801-960 (1970).

criteria considered under sec. 109 (a)(1) of the Act in determining the amount of penalty assessed. Two violations are appealed both as to the Judge's findings of the fact of violation and as to findings on one or more of the criteria considered in assessing penalties.

The violations challenged on appeal are as follows:

Notice/Order No.	*Regulation Violated*	*Date*	*Amount*
1 JHC	30 CFR 75.807	08-29-72	$275
4 JHC	30 CFR 75.807	08-29-72	100
8 JHC-PN	30 CFR 75.902	08-29-72	250
10 JHC-PN	30 CFR 75.400	08-29-72	100
1 FJM	30 CFR 75.603	08-29-72	200
3 FJM	30 CFR 75.1704	08-29-72	200
1 PPM	30 CFR 75.507	09-19-72	250
2 WDW	30 CFR 75.316	12-13-72	100
1 WDW	30 CFR 75.1704	12-13-72	400
1 JSD	30 CFR 75.301-1	01-19-73	150
Total			$2,025

In considering the criteria prescribed in section 109(a)(1) for the purpose of determining the amount of penalties to be assessed, the Judge considered as history of previous violations, *inter alia*, violations already settled or compromised, those presently on appeal, and those which occurred after the violations charged in the instant proceeding. (See Gov. Exh. No. 1.)

Although the Judge submitted a written decision in which he holds that all 10 violations did occur and assessed a penalty for each, the findings of fact and conclusions of law supporting his decision are found only in the transcript of the hearing to which the Judge makes reference. Therefore, in view of the concurrence of all parties, in this instance we will consider such references to be incorporated as a part of the Judge's Decision.[2]

Issues Presented

A.

Whether violations which have been settled or compromised prior to the hearing in the instant case, which are in some stage of litigation at the time of said hearing, or

[2] 43 CFR 4.593 requires that the findings of fact, conclusions of law, and reasons or basis therefor be in writing. Although we are in this case considering that the findings and conclusions appearing in the transcript to be incorporated by reference in the initial decision, we believe this practice places an unduly heavy burden on the Board in reviewing initial decisions particularly where specific reference by page number of the transcript is omitted by the Judge. For this reason and to avoid the possibility of mistake in construing the precise findings and conclusions of the Judge, we believe it would be better practice for the Judge to set forth his findings and conclusions in the text of his decision.

which have taken place subsequent to a violation in the instant case can properly be considered as part of a history of previous violations for purposes of assessment.

B.

Whether the substantial evidence of record supports the findings of the Judge with respect to the occurrence of the subject violations as well as his findings on the criteria required to support the assessments imposed.

Discussion

A.

Objections were made by Peggs Run at the hearing to the relevance of violations already settled or compromised, violations occurring subsequent to those charged in the instant case, and violations being litigated within the Department at the time of the hearing. Sec. 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 provides in part:

> * * * In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

By that provision of the Act the relevance of history of previous violations is clearly established as one factor to be considered in determining the amount of a penalty. The question then becomes how broad is the phrase "history of previous violations."

With respect to violations already settled, *The Valley Camp Coal Company*, 1 IBMA 196, 204, 79 I.D. 625, 1971–1973 OSHD par. 15,385 (1972), clearly indicates that settlements are admissible in evidence to show history of previous violations. The Board held:

> * * * If the operator elects not to request formal adjudication, but to pay the proposed assessment, his payment is in no sense in satisfaction of an offer of compromise and does not vacate or remove from his record the notices of violation upon which the penalties are based.

This posture has been extended in *Corporation of the Presiding Bishop, Church of Jesus Christ of Latter Day Saints*, 2 IBMA 285, 288, 80 I.D. 663, 1973–1974 OSHD par. 16,913 (1973), to include payments made under protest. In *Old Ben Coal Company*, 4 IBMA 198, 218, 81 I.D. 264, 1974–1975 OSHD par. 19,723 (1975), this position is reiterated and extended to include payments made under protest and compromise.

[1] With respect to violations for which notices or orders are issued subsequent to the notice or order in adjudication, a closer scrutiny of the word "previous" must be made. The term must be accorded its ordinary meaning. The term "previous" is antecedent to the term "violations" in the Act. An ordinary meaning of "previous violations"

would be violations found prior to the one at issue. Although it can be affirmatively argued that the purpose of the Act is to protect the health and safety of miners and therefore all violations subsequent to the one at issue should also be considered, this construction negates the ordinary meaning of the language cited. Therefore, such evidence is not relevant and, on that ground, is inadmissible.

With respect to the alleged violations not yet processed through the Assessment Office, or in a stage of being litigated within the Office of Hearings and Appeals, neither are admissible as previous violations. In each situation there has been no final determination that a violation has occurred. Hence, such a record cannot be a history of previous violations.

We believe that the admission of evidence of alleged violations found subsequent to the violations in the instant case was not proper. However, on the basis of our review of the entire record, we believe that there is sufficient evidence, untainted by the admission of said inadmissible evidence, to support the findings and conclusions discussed below.

B.

At the outset we note that Peggs Run stipulated at the hearing that the proposed assessments made by MESA would not affect the operator's ability to continue in business (Transcript of Hearing before Judge Kennedy, pages 17 and 27) (hereinafter Tr.). Thereafter, Peggs Run admitted to a production of about 1,000 tons per day with a three-shift, five-day work week (Tr. 25 & 26).

Eight of the notices on appeal to this Board are objected to on the grounds of excessive penalties. The violations themselves *are not contested.* Sec. 109(a)(1) lays out the six criteria to be considered in assessing penalties. The penalties assessed pursuant to Notices 1 JHC, August 29, 1972; 4 JHC, August 29, 1972; 1 FJM, August 29, 1972; 1 PPM, September 19, 1972; and 1 JSD, January 19, 1973, are each objected to on the ground of lack of adequate evidence to substantiate a finding as to gravity of the violation and negligence. The penalty assessed pursuant to Notice 8 JHC–PN, August 29, 1972, is objected to on the ground of lack of adequate evidence to substantiate a finding as to gravity and good faith attempt to achieve rapid compliance after notification of a violation. The penalty assessed pursuant to Notice 1 WDW, December 13, 1972, is objected to on the ground of lack of adequate evidence to substantiate a finding as to negligence and good faith attempt to achieve rapid compliance after notification of a violation. Having carefully reviewed the transcript, we concur in the finding of the Judge regarding the above notices with respect to findings of negligence and gross negligence, gravity, and good faith attempt to achieve rapid compliance after notification of a violation and

therefore affirm his assessments of penalties in the amount of $1,700.

Notice 10 JHC, August 29, 1972, was for an alleged violation of 30 CFR 75.400. Loose coal and coal dust were found under belts 4 and 5 in 34 piles with a length from 8 to 12 inches each, the width of the belt rollers, and from 7 to 19 inches in height from the floor while the belts themselves were 19 inches from the floor. Peggs Run is challenging the Judge's finding of an unreasonable accumulation of loose coal and coal dust and the finding of negligence in determining the amount of penalties to be assessed. We find the determination of the Judge as to unreasonable accumulations to be based on substantial evidence found on the record. Moreover, after careful review of the transcript with respect to a finding of negligence, we concur with the finding of the Judge especially in light of the extent of the violation and the duty of the operator to continuously watch for and eliminate such accumulations. The penalty of $100 was properly assessed.

Notice 3 FJM, August 29, 1972, was for a violation of 30 CFR 75.1704. The violation alleged was for a failure to have two safe designated escapeways. The return air passageway was one of the two designated escapeways and the object of this notice. The Judge found that such passageway had accumulated water on the floor to a maximum depth of 2 feet. He further found that the roof on the same passageway had become faulty and presented a potentially dangerous condition to those traveling thereunder. In addition, it was admitted that this escapeway was not marked. Peggs Run argued that it had three designated escapeways; the one herein cited, the intake escapeway, and the beltway; and, therefore, there were at least two safe escapeways. It further contended that the parties were instructed as to the three alternate routes while admitting that two were not indicated by signs and without demonstrating a map indicating the beltway as such. The Judge found the beltway to not be a safe escapeway due to a clearance of only 2 feet in one part and lack of designation thereof. He further found the return air escapeway not in compliance with 30 CFR 75.1704 due to the water and roof condition in light of difficulties and risks to disabled miners. We find that such determination was based on substantial evidence and therefore concur. The Judge made a finding as to gravity that the condition was "potentially serious" (Tr. 240). Although we find that phrase to be unclear, the potential danger to miners caused by the described conditions warrants a conclusion that the violation was serious and, based on a thorough review of the transcript, we so find. Consequently, the penalty of $200 is affirmed.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the

Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1. The two notices of violation challenged ARE AFFIRMED and the ten contested penalty assessments totaling $2,025 ARE ALSO AFFIRMED;

2. Peggs Run Coal Company, Inc. pay a penalty assessment in the total amount of $2,025 on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

BELL COAL COMPANY, INC.

5 IBMA 155

Decided *September 23, 1975*

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge George A. Koutras (Docket No. HOPE 75-204-P), dated March 4, 1975, assessing penalties in the amount of $1,475 and vacating a notice of violation in a civil penalty proceeding brought pursuant to sec. 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed in part.

1. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Electric Equipment

The provisions of 30 CFR 75.512 require, *inter alia*, that all electric equipment be maintained in a manner to assure safe operating conditions, and the failure to properly guard drive chains on electrically operated loading machines constitutes a violation of such mandatory safety standard.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and Stephen Kramer, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

The subject of this appeal is Notice No. 1 HRS, issued by Mining Enforcement and Safety Administration (MESA) inspector Harlan R. Sparkman, on August 25, 1970, in the No. 1 Mine of Bell Coal Company (Bell), located at Clothier, West Virginia. The notice cited a violation of 30 CFR 75.512 and described the following conditions:

> The Nos. 1 and 2 loading machines in 1 right were not maintained in safe operating condition, in that the tramming drive chains and conveyor drive chains were not adequately guarded and the drive chain for the No. 2 belt-drive unit was unguarded.

MESA filed a petition for assessment of civil penalty on July 8, 1974, with the Office of Hearings and Appeals charging Bell with 20 violations of the Act. When Bell failed to respond thereto, it was ordered to show cause on October 10,

1974, why it should not be held in default and the matter disposed of in accordance with 43 CFR 4.544 (a). Bell failed to respond to the Order to Show Cause. On December 12, 1974, MESA was ordered to provide all available information, including proposed findings, in order that the Administrative Law Judge (Judge) might summarily dispose of the issues. MESA complied on January 16, 1975. Based on MESA's information, the Judge issued a summary decision on March 4, 1975, which, *inter alia*, vacated Notice No. 1 HRS. In substance, his conclusions were that: 1) 30 CFR 75.512 does not require that the machinery in question be guarded; 2) 30 CFR 75.1722 requires that exposed moving machine parts be guarded; and 3) 30 CFR 75.1722 was the appropriate section to cite in this instance. Based on the foregoing conclusions, the Judge further concluded that MESA had failed to prove a violation of 30 CFR 75.512 and the notice of violation was vacated.

Issue Presented

Whether the Judge erred in vacating Notice of Violation No. 1 HRS, August 25, 1970.

Discussion

In the course of his analysis, the Judge declared that the appropriate section to have been cited was 30 CFR 75.1722 (38 FR 4976, Feb. 23, 1973). This regulation was promulgated, however, more than 2 years after the issuance of Notice No. 1 HRS. We disagree with the Judge's conclusion that 30 CFR 75.512 was inappropriate at the time the subject notice was issued. The provisions of 30 CFR 75.512 are a restatement of the mandatory safety standard set forth in sec. 305(g) of the Act (30 U.S.C. § 865(g) (1970)) and are as follows:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

[1] It is clear from the foregoing facts that the Judge erred in vacating the subject notice of violation. The equipment was not maintained in a manner to assure safe operating conditions as 30 CFR 75.512 requires.

Pursuant to 43 CFR 4.544(a), since the operator was found in default, the Board assumes and finds that the subject violation occurred.

In lieu of a remand, the Board may make the required findings of fact to coincide with the record evidence regarding any of the six criteria of sec. 109(a). *Buffalo Mining Company*, 2 IBMA 226, 230, 80 I.D. 630, 1973–1974 OSHD par. 16,-618 (1973). Accordingly, the Board finds that: 1) the history of Bell's previous violations is insubstantial;

2) it employs 53 persons with a production of 750 tons daily and 150,000 tons annually and is a medium-sized operator; 3) its ability to stay in business will not be affected by the civil penalties assessed; and 4) it exhibited good faith in abating the violation. We also find that Bell was negligent in not exercising reasonable care to repair or provide the required guarding, and that the violation was moderately grave in that it did present a hazard of potential physical injury to any person working in the area of the subject electric equipment. Based upon the foregoing findings, we conclude that an appropriate penalty assessment for such violation is $100.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that that part of the Judge's decision and order vacating Notice of Violation No. 1 HRS, August 25, 1970, in the above-captioned case IS REVERSED; that said Notice is REINSTATED; and that Bell Coal Company pay civil penalties in the total amount of $1,575 within 30 days from the date of this decision.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

ADMINISTRATIVE APPEAL OF THE HOPI INDIAN TRIBE

v.

COMMISSIONER, BUREAU OF INDIAN AFFAIRS

4 IBIA 134

Decided *September 26, 1975*

Appeal from an administrative decision of the Commissioner of Indian Affairs issued October 10, 1974, disapproving Ordinance Nos. 23 and 24, passed by the Hopi Indian Tribal Council.

Docketed and Reversed.

1. Indian Tribes: Constitution Bylaws and Ordinances—Indian Tribes: Tribal Authority

The organic law of the Hopi Tribe found in a constitution authorized by statute, formulated and adopted by the tribal members and approved by the Secretary of the Interior, should be construed for its ultimate meaning under the same rules as are applied in the construction of state and federal constitutions and statutes.

APPEARANCES: Boyden and Kennedy, Salt Lake City, Utah, for appellant, and the Hopi Tribe; David E. Jones, Office of the Solicitor, Department of the Interior, for the Commissioner, Bureau of Indian Affairs; Brown, Vlassis and Bain, Phoenix, Arizona, for the Navajo Tribe.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

This is an appeal from the Memorandum Decision of the Commis-

sioner of the Bureau of Indian Affairs, issued October 10, 1974, allegedly not delivered to the appellant until January 10, 1975, whereby Hopi Ordinance Nos. 23 and 24 were disapproved. The appeal filed with the Commissioner was transmitted with the record on February 21, 1975, to the Board of Indian Appeals where it was received February 26, 1975. Although the Commissioner in his transmittal contends that the appeal was not timely filed, he suggests that the Board should waive the time requirements of 25 CFR Part 2 and consider the appeal on its merits since he had disapproved the two ordinances on the merits of the case.

Without addressing the issue of timeliness of filing of a notice of appeal, the time requirements of 25 CFR Part 2 in effect prior to June 11, 1975, are hereby waived under authority of 25 CFR 1.2 and the Board hereby dockets this case for decision on the merits as a timely filed appeal.

It is only necessary to consider the applicability of the February 26, 1975, decision of the Commissioner as it applies to Ordinance Nos. 23 and 24 since the approval of the other ordinances remain unaffected by this decision.

Legal briefs or statements were filed by all parties in the matter. Moreover, oral arguments were held in the matter on July 28, 1975, at Salt Lake City, Utah. Accordingly, all parties have thus been heard.

The issue presented in this appeal as pointed out in the Hopi's brief and oral argument is whether Sections 1 and 2 of Article VI of the Hopi Indian Tribal Constitution can be so construed so as to be compatible as they are applied to determine the validity and effectiveness of Ordinance Nos. 23 and 24. The word "approved" appears in Section 1 and the word "review" appears in Section 2. The Hopi Constitution was approved by the Secretary of the Interior on December 19, 1936, pursuant to sec. 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 987), *as amended*, 25 U.S.C. § 476 (1970).

Article VI of the Constitution on which the dispute focuses contains the following language:

ARTICLE VI—POWERS OF THE TRIBAL COUNCIL

Section 1. The Hopi Tribal Council shall have the following powers which the Tribe now has under existing law or which have been given to the Tribe by the Act of June 18, 1934. The Tribal Council shall exercise these powers subject to the terms of this Constitution and to the Constitution and Statutes of the United States.

(a) To represent and speak for the Hopi Tribe in all matters for the welfare of the Tribe, and to negotiate with the Federal, State, and local governments, and with the councils or governments of other tribes.

* * * * * * *

(g) To make ordinances, *subject to the approval of the Secretary of the In-*

*terior, to protect the peace and welfare of the Tribe, and to set up courts * * * for the trial and punishment of Indians within the jurisdiction charged with offenses against such ordinances.*

* * * * * * *

Section 2. Any resolution or ordinance which, by the terms of this Constitution, is subject *to review by the Secretary of the Interior*, shall be given to the Superintendent of the jurisdiction, who shall, within *ten* days thereafter, *approve* or *disapprove* the same.

If the Superintendent shall *approve* any ordinance or resolution, *it shall thereupon become effective*, but the Superintendent shall send a copy of the same, bearing his endorsement, to the Secretary of the Interior, who *may*, within *ninety days from the date of enactment*, veto said ordinance or resolution *for any reason* by notifying the Tribal Council of his decision.

If the Superintendent shall refuse to approve any ordinance or resolution submitted to him, within ten days after enactment, he shall report his reasons to the Tribal Council. If the Tribal Council thinks these reasons are not sufficient, it may, by majority vote, refer the ordinance or resolution to the Secretary of the Interior, who *may*, within ninety days from the date of its enactment, *approve* the same in writing, whereupon the said ordinance or resolution shall become effective. (Italics supplied.)

The record is not clear, but no one has attempted to contend that the two ordinances in question were not signed by the Superintendent within the time allowed in Section 2. Nor is there any contention that the Secretary or anyone disapproved the ordinances in question within the 90 days allowed for his review and possible veto. Disapproval of the ordinances was announced for the first time by the Commissioner more than 90 days following enactment.

In the order or ruling issued by the Commissioner on October 10, 1974, the following statement was made:

* * * The manner of review provisions is a nonfunctional section of that Constitution until Section 1 of Article VI is amended to provide that certain tribal council powers are, in fact, subject to Secretarial *review*. * * * (Italics supplied.)

This review will be confined to consideration of Article VI which was the subject of the Commissioner's decision.

It is the Commissioner's untenable conclusion that one portion of the Constitution, *i.e.*, Section 2 of Article VI is "nonfunctional" for the reason that it has no other portion of the Constitution upon which to operate. This construction disregards the rule which requires that no part of a constitution or statute is to be disregarded if an application of a stated provision can be found.

The appellant presents a strong argument in regard to the Commissioner's foregoing conclusion in its brief as follows:

If, as the Commissioner contends, the procedures and time limitations contained in Section 2 of Article VI apply only to ordinances or resolutions requiring Secretarial "review," as that distinction is made by the Commissioner, then in that case the review procedures and time limitations become a nullity, since there is no authority in the Constitution for the Tribal Council to pass an ordinance or anything else subject merely to "review." It need scarcely be documented that such interpretation is disfavored and

is to be avoided in all possible cases. *See e.g., Ex parte Public National Bank of New York*, 278 U.S. 101, 73 L. Ed. 202, 49 S. Ct. 43 (1928).

It is entirely logical and reasonable, indeed, upon reading Article VI as a whole, it is obvious that the "approval by the Secretary" referred to in Section 1 of Article VI is precisely the process of obtaining review referred to in Section 2, which process is explicitly subject to the stated time limitations. Here again, well-established principles of construction require that a document be construed as a whole to give effect to all its parts. *See, e.g., Weinberger* v. *Hynson, Westcott & Dunning*, 412 U.S. 609, 633, 37 L. Ed. 2d 207, 93 S. Ct. 2469 (1973).

In *Ex Parte Public National Bank*, *supra*, cited by appellant, the Supreme Court said:

> But we are not at liberty thus to deny effect to a part of a statute. No rule of statutory construction has been more definitely stated or more often repeated than the *cardinal rule that "significance and effect shall, if possible, be accorded to every word.* As early as in Bacon's Abridgment, § 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *Market Company* v. *Hoffman*, 101 U.S. 112, 115. * * * (Italics supplied.)

In *Weinberger*, *supra*, cited above in the Hopi brief, the Supreme Court was required to interpret the provisions of the 1962 amendments to the Federal Food, Drug and Cosmetic Act. The Court said:

> Moreover, Hynson's argument * * * would render clause (C) superfluous. Under Hynson's reasoning, any drug that could satisfy clause (B)—*i.e.*, any drug that had become generally recognized as safe—automatically would satisfy clause (C). This construction, therefore, *offends the well-settled rule of statutory construction that all parts of a statute, if at all possible, are to be given effect.* See, *e.g., Jarecki* v. *G. D. Searle & Co.*, 367 U.S. 303, 307; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208. * * * (Italics supplied.)

[1] In line with the cases cited above the organic law of the Hopi Tribe found in the Constitution authorized by statute, formulated and adopted by the tribal members and approved by the Secretary of the Interior should be construed for its ultimate meaning under the same rules as are applied in the construction of state and federal constitutions and statutes. Accordingly, we find no reason why the ordinances in question should not be construed in that manner.

In the oral arguments held in the matter the Commissioner in furtherance of his position contended that:

(1) The ordinances in question were subject to approval by the Secretary to become effective.

(2) The Board lacked jurisdiction to review the action of the Commissioner.

We are not in agreement with either contention. The argument that the review provisions of Section 2 of Article VI are nonfunctional is wholly untenable. To uphold such construction would totally disregard the cardinal rule hereinabove discussed which requires that no part of a constitution or statute is to be disregarded if a logical application thereof can be found. Well established principles of statutory

construction require that a document be construed as a whole to give effect to all its parts. *Weinberger* v. *Hynson, Westcott and Dunning, Inc., supra.*

We are not persuaded by the Commissioner's argument that the Board lacked jurisdiction to review his decision.

The Commissioner in his decision of February 6, 1975, officially disapproving the ordinances in question, did not treat the matter as discretionary and final for the Department. On the contrary, the Commissioner on the same date in transmitting the Hopi appeal of January 20, 1975, requested that the Board review the appeal on its merits. The Commissioner's transmittal of February 21, 1975, in relevant part, stated:

> It is clear to us that the appeal period expired long before the filing of the enclosed complaint. However, we suggest you consider waiving the time limits and *rule on the merits of the case.* (Italics supplied.)

The Navajo Tribe, allowed to participate in the oral arguments due to its interest in the matter, contends:

(1) That the ordinances in question required approval by the Secretary rather than the Superintendent because of the far-reaching effects of the ordinances.

(2) That the law and order and grazing regulations regarding the disputed area, effective as of August 1, 1975, will render the Hopi ordinances moot.

The Navajo's first argument has been discussed elsewhere in connection with the Commissioner's contention to the same effect and needs no repeating or further elaboration at this point.

The Board finds merit in the Navajo contention No. 2. In connection therewith, the Board takes note of the Act of December 22, 1974, 88 Stat. 1712; the Law and Order and Grazing regulations appearing in the Federal Register, Vol. 40, No. 128, dated July 2, 1975; and the case of *Healing* v. *Jones*, 210 F. Supp. 125 (D. Ariz., 1962), *aff'd* 363 U.S. 758 (1963). It would appear to this Board that the Federal District Court for the District of Arizona continues to retain jurisdiction over the disputed area and the parties involved therein by virtue of *Healing* v. *Jones, supra*, and the Act of December 22, 1974, *supra.* Moreover, any local interference thereto by either Tribe would be dealt with as the court might deem appropriate. It further appears that the grazing and protective regulations promulgated pursuant to *Healing* v. *Jones, supra*, and the Act of December 22, 1974, *supra*, would stay the the efficacy of Hopi Ordinance Nos. 23 and 24.

For the reasons hereinabove set forth, the Board finds:

(1) That the time limitations set forth in Section 2, Article VI, of the Hopi Constitution is binding upon the Commissioner and that both ordinances became effective upon approval by the Superintendent.[1]

[1] Memoranda of April 18, 1941, and April 26, 1941, of W. H. Flanery, Chief of Division, Office of the Solicitor, Department of the Interior, further substantiate the position of

(2) That the Board has jurisdiction over the subject matter.

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), *as amended*, June 12, 1975, the decision of the Commissioner of Indian Affairs, dated October 10, 1974, disapproving Hopi Ordinance Nos. 23 and 24, be, and the same is hereby REVERSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

WE CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

JAMES R. RICHARDS,
Director, Office of Hearings and Appeals.

RUSHTON MINING COMPANY

5 IBMA 170

Decided *September 26, 1975*

Appeal by Mining Enforcement and Safety Administration from a decision by Administrative Law Judge John F. Cook (Docket Nos. PITT 73-371-P, PITT 74-38-P, and PITT 74-50-P), dated January 31, 1975, in which the Judge, in a proceeding to assess civil penalties pursuant to the Federal Coal Mine Health and Safety Act of 1969, inter alia, vacated a Notice of Violation charging noncompliance with 30 CFR 75.507 and assessed penalties in the amount of $2,985 with respect to 24 notices of violation.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Evidence: Preponderance

Where the only evidence offered to prove a violation of 30 CFR 75.507 was the credible opinion of the inspector which was offset by the credible opinion of the operator's witness of equal expertise, the Board will not overturn the Administrative Law Judge's determination that the fact of violation was not established by a preponderance of the evidence. 43 CFR 4.587. *Zeigler Coal Company*, 4 IBMA 88, 82 I.D. 111, 1974-1975 OSHD par. 19,478 (1975).

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, and Stephen Kramer, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; John R. Carfley, Esq., for appellee, Rushton Mining Company.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This appeal concerns *Notice of Violation No. 2, WEH, May 17, 1973* (Docket No. PITT 74-38-P), issued to Rushton Mining Company (Rushton) at its Rushton Mine in Rush Township, Centre

this Board. However, the memoranda were made known to the Board too late for its consideration in arriving at its decision.

County, Pennsylvania, alleging a violation of 30 CFR 75.507 (30 U.S.C. § 865(d) (1970)), which the Administrative Law Judge (Judge) vacated on the ground that the Mining Enforcement and Safety Administration (MESA) had failed to establish the fact of violation by a preponderance of the evidence.

The Notice alleged that return air was passing over two open-type electric pump motors in violation of 30 CFR 75.507. That regulation, 30 CFR 75.507, which is a restatement of the statutory provision in section 305(d) of the Act (30 U.S.C. § 865(d) (1970)), provides as follows:

> Except where permissible power connection units are used, all power-connection points outby the last open crosscut shall be in intake air.

At the hearing held on June 26–28, 1974, in Ebensburg, Pennsylvania, the issuing inspector for MESA testified that, although he believed the condition cited to be readily observable, he made no measurements or tests to ascertain the direction of flow of air over the motors, *i.e.*, whether it was return air. Rushton's safety director, who had 30 years of coal mining experience, testified that the design of the mine ventilation system was such that it was extremely unlikely that return air would pass over the pump motors. It appears from the record that the system utilizes a powerful exhaust fan to exhaust the return air at a rate of 140,000 cubic feet per minute. At the same time, intake air is drawn into the pump chamber from a bore hole located in the chamber. It was the opinion of the safety director that, since air follows the path of least resistance, the intake air being drawn into the return air passageway by the exhaust fan would prevent return air from entering the chamber and passing over the pumps.

In his decision, the Judge labeled both positions as equally plausible and ruled that MESA had not met its burden of proof. Accordingly, he vacated the Notice. MESA contends that the Judge erred in his evaluation of the evidence.

Issue Presented

Whether MESA established by a preponderance of the evidence that open-type (nonpermissible) power connection units were in return air, instead of intake air, in violation of 30 CFR 75.507.

Discussion

[1] The Board is of the opinion that the Judge was correct in vacating the Notice in issue. Rushton presented plausible evidence which indicated that it was extremely unlikely, if not impossible, for the alleged condition to have existed. MESA presented no direct evidence other than the inspector's testimony that the condition was readily observable and did not refute the evidence of Rushton. The inspector took no smoke tests or anemometer

readings to indicate the direction or amount of return air, if any, flowing through the pump chamber nor did he allege that the bore hole to provide intake air to ventilate the pump chamber was blocked or clogged. Based upon the foregoing, we concur in the Judge's ruling that MESA failed to establish a violation of 30 CFR 75.507, and that the Notice of Violation should be vacated.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED and that Rushton Mining Company pay penalties in the total amount of $2,985 on or before 30 days from the date of this decision.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

APPEAL OF J. A. LAPORTE, INC.

IBCA-1014-12-73

Decided *September 29, 1975*

Contract No. CX500031057, Beach Nourishment Project, Cape Hatteras National Seashore, National Park Service.

Granted in Part.

1. Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Notices—Contracts: Disputes and Remedies: Equitable Adjustments

Under a construction contract for a beach nourishment project at Cape Hatteras involving a contractor's claim for equitable adjustment based upon the Government directing the beach fill to be placed in a manner differing from the typical cross section shown on the contract drawing, the Board finds that the 20-day notice provision of the Changes clause should not preclude consideration of the claim on the merits where there is no one action of the Government which can be pointed to as the identifiable event upon which the claim is grounded and from which the contractor's delay in presenting the claim can be measured, particularly where the evidence of record indicates that the Government's actions contributed to and may even have been the principal cause of the delay in giving notice of the claim.

2. Contracts: Construction and Operation: Modification of Contracts: Generally—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Performance or Default: Release and Settlement

A contractor's acceptance of a change order is found to be no bar to consideration of a claim under the Changes clause where the evidence shows that the claim involved had neither arisen nor been discussed prior to the time the change order in question was executed.

3. Rules of Practice: Appeals: Motions—Rules of Practice: Evidence

A contractor's parol evidence rule objection to the admission in evidence of the

answer given to a question raised at a prebidding conference as set forth in a contemporaneous Government memorandum is overruled where the Board finds that the answer given simply reflects information contained in the invitation for bids on which the contract is based.

4. Contracts: Construction and Operation: Contracting Officer—Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Performance or Default: Inspection

A special provision authorizing the contracting officer to adjust or revise the limits of the work during performance to reflect the conditions encountered and thereby provide for maximum use of material available with the funds allotted is found to vest the contracting officer with no plenary authority to direct the placement of the beach fill where the authorization to adjust or revise the limits of the work is circumscribed by the use of the word "approximate."

5. Contracts: Construction and Operation: Drawings and Specifications—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: General Rules of Construction—Contracts: Construction and Operation: Conflicting Clauses

In a case involving the question of the importance to be ascribed to the typical cross section shown on the contract drawings, the Board finds that the drawings contained positive representations on which the contractor was entitled to rely and did rely in submitting its bid, noting, in connection therewith, that the interpretation advanced by the Government with respect to certain provisions on the drawings, in the contract and in a change order would render inoperative or superfluous other requirements clearly imposed by the drawings or contract terms. Previously the Board had found that the contractor's site visit was adequate and in any event could not have revealed conditions created by storms which took place several months after the scheduled site visit concluded.

6. Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Estimated Quantities—Contracts: Disputes and Remedies: Equitable Adjustments

An estimated quantities provision under which the Government was authorized to obtain additional quantities of beach fill at the unit price specified in the contract so long as the additional quantities did not exceed 25 percent of the original total contract price is found not to preclude an adjustment under the Changes clause for clearly unforeseeable costs to the extent the contractor shows (i) the basis upon which its bid was calculated and (ii) the causal connection between the increased costs and the inability or the failure or the Government to adhere to the typical cross section shown on the contract drawings in directing the placement of the fill.

7. Contracts: Construction and Operation: Notices—Contracts: Disputes and Remedies: Burden of Proof—Contracts: Performance or Default: Suspension of Work

A claim under the Suspension of Work clause is denied where the Board finds (i) that the contracting officer acted within his discretion in issuing an order directing the suspension of all work in the wake of a devastating storm at Cape Hatteras with a view to determining whether and, if so, how the work under a beach nourishment contract should proceed or, alternatively, whether the contract should be terminated for the convenience of the Government; (ii) that the contractor had failed to show that

its costs would have been any less if the stop work order had been issued at an earlier time; (iii) that suspending the contract work for the 5 working days covered by the stop order did not involve delaying the work for an unreasonable period of time; and (iv) that showing the contract work to have been suspended or delayed for an unreasonable period of time is a prerequisite to recovery under the Suspension of Work clause in all cases including those in which a written order to suspend work has been given as contemplated by paragraph (a) of the clause.

APPEARANCES: Mr. Dillard C. Laughlin, Attorney at Law, Phillips, Kendrick, Gearheart & Aylor, Arlington, Virginia, for the appellant; Mr. Donald M. Spillman, Department Counsel, Atlanta, Georgia, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The formally advertised contract involved in this appeal was awarded to the appellant as low bidder on November 16, 1972. It called for the furnishing of all the labor, material and equipment required for the removal of approximately 1,000,000 cubic yards of material from a designated borrow area and for the placement as beach nourishment (hydraulic beach fill) in accordance with the contract drawings at the unit price bid of $1.31 per cubic yard; mobilization and demobilization expenses at the lump-sum bid amounted to $150,000 resulting in a total estimated contract price of $1,460,000.

Prepared on standard forms for construction contracts and including the General Provisions found in Standard Form 23–A (October 1969 Edition), the contract (Exhibit 45),[1] required the work to be complete within 180 calendar days after the date of receipt of the notice to proceed. The notice was received on December 6, 1972, thereby establishing June 5, 1973, as the date for completion of the contract work (Exhibit 41). The time for performance was extended 5 days because of a Government issued stop order and 87 days for the reasons set forth in Change Order No. 2 (Exhibits 26 and 31), changing the date for completion of the contract to September 5, 1973. The contract was accepted as substantially complete on September 19, 1973 (Exhibit 14).[2] Liquidated damages have been assessed for the 14 calendar days of delay involved at the contract specified rate of $100 per day or in the total amount of $1,400.

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[1] Except as otherwise specifically indicated, all references to exhibits are to those contained in the appeal file.

[2] Final inspection and acceptance occurred on December 5, 1973 (Exhibit 9). The Findings of Fact made by the contracting officer in connection therewith states:

"* * * Project Supervisor Riddel had observed during the course of the project that the contractor was not developing the necessary survey data for the preparation of as-constructed drawings. Because of the apparent failure Mr. Riddel carefully and thoroughly maintained daily project data sufficient for the final preparation of the drawings and completion report."

Chronology of events

Some 9 months before the award of the instant contract, the appellant had successfully completed a much smaller contract [3] for the National Park Service involving mobilization and demobilization and the placement of 200,960 cubic yards of beach nourishment at Cape Hatteras.[4] At the prebidding conference on October 11, 1972 (Exhibit 45A),[5] the appellant's president, Mr. John MacDonald, had raised a question as to the Government's intentions with respect to the placement of beach fill in the light of the company's experience on the earlier contract (Tr. 41, 42). From the answer received, Mr. MacDonald had concluded that the fill would be placed according to the plans and specifications (Tr. 59, 60).

The preconstruction conference was held on December 6, 1972. Mr. MacDonald testified that the job was mobilized in January of 1973 and pumping of the beach fill began in late February (Tr. 20, 21).[6] Before the pumping began, Mr. Preston D. Riddel was named as the contracting officer's representative and project supervisor on the instant contract.[7] In letters dated February 19 and 20, 1973,[8] the con-

[3] At the time award of the instant contract was under consideration, a Government official made the following appraisal of appellant's performance under the prior contract:

"All personnel employed by the contractor were well qualified in their particular craft skills to accomplish all necessary phases of the operations.

"The contractor exercised a most innovated and technical implementation in placement of booster stations for supplying beach nourishment." (Exhibit 45; memorandum dated November 10, 1972, from Preston D. Riddel, Project Supervisor, Cape Hatteras to Director, Southeast Region, National Park Service.)

[4] Exhibit 45 (note 3, *supra*); the predecessor contract involved the same borrow area and approximately the same location for the fill (Tr. 19).

[5] The memorandum to files dated October 12, 1972, from the project supervisor (note 3, *supra*), contains the following paragraph:

"12. The plans indicate a uniform placement of material. Is it not a fact that the majority of the quantities will be on the long end of the line?

"(Mr. MacDonald indicated this fact was true in his experience during the previous contract.) It can be anticipated that the major operation will take place on the north half of the project since the operation calls for north to south placement. Many factors may require field consideration which would dictate remaining at one spot and placing sufficient material to acquire the satisfactory fill in the surf zone. Naturally, a great deal is contingent on the method of operation and quantities pumped by the Contractor."

[6] It is not entirely clear from the record as to when the job was mobilized or when pumping the sand began. The Complaint (paragraph 5) states that mobilization began on or about December 7, 1972. Later in his testimony Mr. MacDonald stated that the company had probably been pumping a month or less when Change Order No. 2 was received (Tr. 25). Change Order No. 2 is dated May 18, 1973 (*i.e.*, over 2½ months after "late February"). In the main, witnesses for both the appellant and the Government testified without reference to project diaries or notes of any kind to aid their recollection. It is evident from the record that the project supervisor did maintain a diary and detailed records (Note 2, *supra*; Exhibit 26).

[7] In a letter dated December 26, 1972, and signed Vernon Ingram, Contracting Officer, the contractor was advised: "You are again reminded that any arrangements or agreement with respect to the administration or execution of this contract with persons other than those named in this letter will not necessarily be binding on the Government. Only the Contracting Officer may approve changes in the work that will result in extra costs or adjustments in costs to the Government and/or in contract time." (Exhibit 38.)

[8] The February 19, 1973, letter (Exhibit 36) was signed by A. H. Meyer, who was the contractor's project superintendent from the commencement of the work until August 1, 1973 (Exhibits 24 and 45A). In the Febru-

tracting officer was notified of the changes to the area of the beach covered by the contract as a result of the severe storm of February 10–12, 1973. Testifying on behalf of the Government with respect to the conditions brought about by the storm from Station 2228 [9] northward, the project supervisor stated:

* * * Northward to about Station 2175, the area was completely inundated, the North counter rocks 12, the Highway was a large sand pan. By sand pan I mean an over wash pan that went all the way from the ocean back to the sound. Approximately 200 feet of dune and surf zone had been eroded in this area. Three major motels have lost around 45 to 50 feet of the end section in the Eastern end. One large beach cottage was washed into the sea. A couple of other cottages (were) blown out and tipped over on their sides. Sand pan down through that populated area. Approximately 500,000 [10] cubic yards of material was displaced in this area, whether overwashed across the road and back to the sound or carried down to where we did find evidence of accretion on the beach below the Loran Station on the point. * * * It also moved the contractor's pipe line back far enough to upset a couple of Loran Equipment antennas to the dismay of the Coast Guard. The largest difficulty from this * * * destruction was to the road, the private sector, and the Northern limits of our project that we were working. (Tr. 141, 142.)

In a letter written under date of February 27, 1973 (Exhibit 34), the contracting officer advised the contractor that the conditions brought about by the recent storm were being carefully evaluated and that the continued forbearance of the contractor would be appreciated until the Government could determine its future course of ac-

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ary 20, 1973, letter (Exhibit 35), appellant's president, John MacDonald, referred to changed conditions created by the storm after which he stated:

"The changed condition is: Part of the Park beach and dune has washed away and the Park property is now below the Ocean low water line.

"It is necessary for the Park Service to obtain permission from private property owners to place sand on their property in order to reclaim Park property from the Ocean.

"In this area where there is no dune, it will be necessary to place the fill in a south to north direction in order to protect the pipeline."

* * * * *

[9] Mr. MacDonald testified that from approximately station 2228+50 northward the dune system which had been erected earlier had been washed away because the beach itself was gone (Tr. 22). Change Order No. 1 (note 12, *infra*) cites station 2228+00 as the point of reference.

[10] The estimate of approximately 500,000 cubic yards of sand lost in the northern section related only to the February 10–12, 1973, storm, as is clear from the testimony given by Mr. Riddel a short time later:

"* * * Unfortunately, we cannot tell you the exact quantity that was lost in * * * a three day Northeaster starting the 19th of March. We lost more material, we lost more structures. Again the North counter rock 12 had been relocated more than 600 to 800 feet West of where the original location was. That had been inundated by sand, another sand bank over that area * * *. So, as we looked at it, we had four large embayments. * * * If we had been hit by another Northeaster we probably would have had an inlet in that area. So this is why we desperately needed more yardage for that Northern sector." (Tr. 143, 144.)

The contracting officer's testimony that the records he had read showed something like 500,000 cubic yards of sand to have been lost was apparently related only to the February 10–12, 1973, storm (Tr. 98).

There is nothing to indicate that the appellant had access to records showing the amount of sand lost in any of the storms. Responding to a question on cross-examination as to how many cubic yards of sand were washed away in the two storms, Mr. MacDonald stated: "* * * I remember someone saying, something like 500,000 cubic yards. * * *" (Tr. 51).

tion. Thereafter, by telegram dated March 6, 1973 (Exhibit 33), the contractor was directed to suspend [11] all work as of the close of business on March 7, 1973, until further notice. An order to resume work was given on March 13, 1973 (Exhibit 31).

A week later the Government issued Change Order No. 1,[12] which made certain changes relating to the borrow area and directed that from Station 2228 Northward to the beginning of the project pumping should proceed from south to north. The Change Order (Exhibit 29) recited that it was issued pursuant to Article 3 of the General Provisions and specified that there would be no increase in the contract cost or time of performance resulting from the changes. As requested in the instrument the contractor acknowledged receipt of the Change Order [13] by his signature thereon immediately below the following statement: "The procedural work adjustments set forth in this change order are satisfactory and are hereby accepted."

By May 8, 1973, the contracting officer had become concerned over delays in contract performance. In a letter written on that date [14] he noted that the contractor had used approximately 151 days to accomplish 20 percent of the contract work and that there then remained only approximately 33 days to complete the balance of the work. A serious question was raised as to the extent to which the delays experienced were primarily due to a series of equipment failures.

Some time prior to May 9, 1973, the Government concluded that it should exercise its right under the contract [15] to increase the contract

[11] Citing Clause 23(a) of the General Provisions as its authority the stop order stated: "The changed conditions brought about by the recent storm require a complete reevaluation of this project work. At this time there is a strong possibility that a determination will be made to terminate the contract for the convenience of the Government."

[12] Included in the body of the change order were the following provisions:

"2. Because of changes in the beach profile and the loss of protective dune structures, you are to begin pumping operations at Station 2228+00 and continue in a northerly direction to the point of beginning designated on the contract drawings. The nourishment cross-sectional plan incorporated in your contract is to be followed where practical, but adjustments must be made consistent with the position of the inner and outer bars and other oceanic conditions.

"3. After reaching the project beginning point, fill placement will be in a southerly direction from Station 2164+80.

"4. All pipe will be installed on United States property unless the contractor elects to negotiate with private landowners for access across their lands. The contractor must indemnify and save harmless the United States Government from any and all of his operations and activities on private properties.

"Except as provided herein, all terms and conditions of this contract remain unchanged and in full force and effect."

* * * * *

(Exhibit 29)

[13] The Change Order is dated March 20, 1973. This is only 1 day after the commencement of the storm characterized by Mr. Riddel as "a three day Northeaster" (note 10, *supra*).

[14] In especially pertinent part the letter of May 8, 1973, states:

"* * * In looking for conditions that have caused this unfavorable position, one appears to be foremost and that is the series of equipment failures. We believe you will agree that considerable time has been lost due to major breakdowns." (Exhibit 28)

[15] "SP-8 CHANGES AND ALTERED QUANTITIES: Payment to the Contractor will be made on the basis of actual quantities of work performed; however, in accordance with the 'Changes' clause of the General Provisions, the Contracting Officer may make changes in the plans and specifications. If the change (or changes) does not result in an increase or

quantities by 25 percent. Prior to the issuance of a written change order the contracting officer had called the contractor's attention to the existence of the right and had secured the contractor's agreement to accept the 25 percent increase in hydraulic beach fill at the contract price (Exhibit 27, Tr. 23–25; Tr. 103–109).

In the letter of May 9, 1973 (Exhibit 27), accepting the increase in quantity, the contractor stated that the accomplishment of the additional work would require 45 extra days. The letter also included a request for a 42-day time extension for excusable causes of delay related to wet conditions in the staging area (10 days), the February storm (18 days), the stop order of March 6, 1973 (14 days of which a 5-day time extension had previously been granted), and the March storm (5 days).

Change Order No. 2, dated May 18, 1973 (Exhibit 26),[16] granted the requested time extensions and directed the contractor to perform the following additional work:

1. Place and additional 250,000 cu. yds. of hydraulic beach fill (beach nourishment) within the work limits specified by the contract drawings. This additional work is to be accomplished in complete accordance with the provisions and specifications of the contract.

You will be compensated for this additional work at the contract unit price of $1.31 per cu. yd. * * * [17]

* * * * *

decrease of more than 25% of the original total contract amount, no adjustment in the contract unit prices will be made. If the change (or changes) results in an increase or decrease of more than 25% of the original total contract amount, then upon demand of either party, an equitable adjustment shall be made of the unit price or prices representing the item or items causing the main increase or decrease; in case of an increase, any adjustment in payment shall apply only to the related quantities of work performed in excess of the stated percentage; in the event of a decrease, any adjustment in payment shall apply to the quantity or quantities of work actually performed." (Exhibit 45; Special Provisions.) *See also* clause 60 of the General Provisions entitled "VARIATIONS IN ESTIMATED QUANTITIES."

[16] Testifying on direct examination as to the reason for the issuance of Change Order No. 2, the contracting officer stated:

"We had determined that the additional material was necessary in order to develop the uniform beach nourishment project that we were after. I don't believe we ever reached the typical profiles that were projected in our construction drawings. But we were endeavoring to stay as uniform as possible through the beach development project. The 250,000 cubic yards was necessary to replace yardage lost during the storm." (Tr. 97.)

On cross-examination the project supervisor stated that the additional 250,000 cubic yards were needed to get to the northern end of the job (Tr. 156). The project supervisor recollected having specifically discussed the matter with the contractor's on-site representative, Mr. Meyer (Tr. 156, 171). Concerning this conversation he stated: "* * * It would go up there, it had to go there because we knew that 500,000 cubic yards was taken out of there by one storm. * * *" (Tr. 171.)

Mr. Meyer testified that additional sand was needed "to repair the storm damage" (Tr. 136). It is not clear whether Mr. Meyer considered that the additional sand was needed only in the northern area or over the entire job. Nowhere in his testimony (Tr. 131–140) is there any indication that he was aware that 500,000 cubic yards of sand had been taken out of the northern end of the job in one storm.

[17] In the Finding of Fact pertaining to the Change Order the contracting officer states:

"Public Law 92–306, 92d Cong. authorized $4.3 million for emergency storm damage repairs at Cape Hatteras NS.

"* * * The Government is obligated by the Public Law to provide the maximum possible protection within the emergency funds allotted. Contract provisions permit the enlargement of the contract work up to 25% at the prevailing unit price.

Continued

In a letter dated August 7, 1973 (Exhibit 23), the contracting officer called attention to the fact that as of July 31, 1973, the contractor had completed 69 percent of the contract work and that there was less than 30 days remaining for completion of the project. The contractor responded by a letter dated August 15, 1973 (Exhibit 20), in which it noted that there had been certain circumstances in regard to the job prejudicial to completing the work on time. More specifically, it requested time extensions because of the alleged departure from the contract regarding the deposit of the beach fill [18] and difficulty with a supplier.[19] At the same time it forwarded two claim letters for additional compensation. One letter dated August 15, 1973 (Exhibit 19), is concerned with an alleged change [20] in the contract as a result of the manner in which the beach fill had been placed. The other letter dated August 15, 1973 (Exhibit 21), presents a claim for compensation attributed to a Government issued stop order.

Claim for misplacement of fill—$300,000

The claim letter of August 15, 1973 (Exhibit 19), requested additional compensation

* * * by reason of the change in the above contract accomplished at the decision of the United States, as follows:

1. The contract calls for an approximately even distribution of the beach fill over the entire length of the project, i.e., 10,200 feet; in fact the greater propor-

Continued

"Accordingly, in view of the authorization provided by the Public Law and the attendant obligation of the Government to repair storm damage conditions, it was unanimously agreed by Park Service Officials that the contract should be expanded by 250,000 cu. yds. This additional work will be performed at the prevailing unit price which is very definitely in the best interests of the Government."

[18] "Whereas the contract calls for distributing the beach fill relatively uniformly along the beach, the great majority of the fill has been deposited at the northern end of the project. This has resulted in a greatly lengthened pipe line with booster pumps running wide open constantly for long periods of time. This additional stress on the equipment has caused a greater number of mechanical breakdowns than would otherwise be the case. * * * Toward the south end of the project we would expect to pump approximately 700–800 cubic yards per hour; at the north end of the project we can produce only approximately 300–400 cubic yards per hour." (Exhibit 20.)

Mr. MacDonald testified that they tried to pump 24 hours a day, 7 days a week (Tr. 29).

[19] "The wear and tear on our pumps goes up in multiples as greater pressure is needed by reason of the distance from the borrow area. We have been delayed by our supplier of pump shells on pumps which were worn out by reason of the higher pressures necessitated by the longer lines. * * *" (Exhibit 20.)

[20] "We have been concerned over this departure from the contract for some time but have not been sure in what manner the balance of the beach fill would be placed once the contract was changed in this regard. * * *" (Exhibit 19.)

Addressing himself at the hearing to the failure of the contractor to submit a written protest or to even make a strong oral protest to the project supervisor (Mr. Riddel) at an earlier time, Mr. John MacDonald stated:

"So, it wasn't real obvious, you know, he didn't come down and say because of the storm we are only going to do about 6,000 foot of beach. We're eliminating the Southern third. If he had told me that in writing or officially, I certainly would have made a much bigger protest through channels and to the contracting officer. But this was never indicated and, if the further South we got from the shorter lines, the more money we made and the better it got. And we kept thinking, well, it will get better and we'll get down there and we'll do that. * * * [S]ome time around August, the end of July, when Mr. Meyer was leaving, he * * * came to me and he said it looks like we're not * * * ever going to get as far as the groins. * * *" (Tr. 185, 186.)

tion of the fill has been placed at the northern end of the project.

2. The contract calls for a berm approximately 100 feet wide throughout the length of the project; the addition of 250,000 cubic yards to the project would increase this berm width to 125 feet throughout the length of the project. A berm of much greater width has been built throughout most of the northern half of the project.

In his decision of November 29, 1973 (Exhibit 12), the contracting officer did not dispute the contractor's contention that more sand was placed in the northern half of the project. He found, however, that the contract did not call for even distribution of beach fill over the entire length of the project. In support of this finding, the contracting officer quoted from Paragraphs SP-1(A),[21] SP-8,[22] and SP-13A[23] of the Special Provisions and from a note on Drawing No. 603/80,050 (Sheet 3 of 4) reading as follows:

THE SHORELINE OF HATTERAS ISLAND HAS CHANGED SINCE THE PHOTOGRAPHIC BASE MAP WAS MADE * * * THE SHORELINE CHANGES TO DATE WILL NOT AFFECT THE BEACH NOURISHMENT PROJECT SHOWN HEREON.[24]

Immediately thereafter the findings state:

Implicit in the foregoing is the idea that subsequent shoreline changes would affect the beach nourishment project. This is in fact what happened. The additional 250,000 cubic yards of beach nourishment was ordered after a major change in conditions resulting from a storm on February 10–12, 1973, necessitating alteration of the basic design cross-section. At the time of acceptance of Change Order No. 2,[25] the contractor's

[21] "SP–1 DESCRIPTION OF WORK: The work consists of mobilizing, transporting and demobilizing plant and equipment; removing material from a predetermined borrow area and distributing it as shown on the contract drawings and as directed as beach nourishment.

"A. Approximate limits of work, elevations and slopes of fill are indicated on the contract drawings. The Contracting Officer will adjust or revise these limits to suit conditions during the work to provide for maximum use of material available with funds allotted." (Exhibit 45; Special Provisions.)

[22] See Note 15, *supra*.

[23] "SP–13 AS CONSTRUCTED DRAWINGS

"A. When the work is completed, the Contractor shall provide the Contracting Officer with a set of as-constructed drawings on clean prints of the original drawings. The as-constructed drawings shall indicate in an accurate manner all changes and revisions in the original design. * * *" (Exhibit 45; Special Provisions.)

[24] The photographic base map referred to in the text was made in 1967. A number of features were drawn thereon at a considerably later time based upon a field survey (Tr. 153). The invitation for bids is dated September 5, 1972. An addendum was issued on October 5, 1972. The bid is dated November 6, 1972 (Exhibit 45).

The opening sentence in the BID FORM provided with the invitation reads: "In compliance with the above-dated invitation for bids, the undersigned hereby proposes to perform all work for Beach Nourishment, Drawing No. 603/80050 (4 sheets)."

The face page of the contract contains the caption "Contract For (Work to be performed)" under which appears: "Furnish all labor, material and equipment to place hydraulic beach fill (beach nourishment) as indicated on the drawings." The drawings are identified thereon as "Drawings (4 pages) No. $\frac{603}{80,050}$".

[25] Asked by the hearing member to estimate the extent to which the 1,000,000 cubic yards on the original contract had been pumped prior to the time Change No. 2 (Exhibit 26) was issued increasing the contract quantity by 250,000 cubic yards, the project supervisor stated:

"The contractor pumped 160,000 yards in April and I'd say by the 18th of May probably another 160,000, probably a third, around a third of his 1,000,000 yards. I would have to

Continued

field superintendent was well aware of existing conditions, and the contractor's president was aware of the February storm, as evidenced by his letter of May 9, 1973 (Exhibit 3), requesting an 18-day time extension by reason thereof and agreeing to acceptance of the additional work. Change Order No. 2, which was accepted by the contractor, calls for the 250,000 cubic yards of beach fill to be placed "within the work limits specified by the contracting drawings." All of the material was so placed. Furthermore, at a pre-bid on-site inspection, the contractor was told that the major operation would be in the northern half of the project limits, as evidenced by question and answer No. 12 in a memorandum dated October 12, 1972 * * *. (See note 5, *supra*.)

Accordingly, the contractor's claim for additional compensation based on the alleged contract changes [26] is denied. (Exhibit 12.)

The appellant's position is succinctly stated in the Complaint:

9. * * * the gravamen of Appellant's claim is that the contract required distribution of the hydraulic beach fill in a 100 foot berm [27] except at the tapered north

Continued
go back and check the daily logs to find out what he had, but it was about a third." (Tr. 182.)

The import of the project supervisor's testimony was that pumping of the beach fill did not commence until April of 1973. The accuracy of this assessment is confirmed by Government Exhibit A (text accompanying notes 41–43, *infra*) which at pages 20 and 24 indicates that pumping began in late March or early April of 1973. We so find.

[26] With respect to contract changes the General Provisions provide:

"CHANGES

"(a) The Contracting Officer may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes:

"(i) In the specifications (including drawings and designs;

"(ii) In the method or manner of performance of the work;

"(iii) In the Government-furnished facilities, equipment, materials, services, or site; or

"(iv) directing acceleration in the performance of the work.

"(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a change order.

"(c) Except as herein provided, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment hereunder.

"(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly: *Provided, however,* That except for claims based on defective specifications, no claim for any change under (b) above shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required: *And provided further,* That in the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.

"(e) If the Contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under (b) above, submit to the Contracting Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the Government. The statement of claim hereunder may be included in the notice under (b) above.

"(f) No claim by the Contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract."

[27] This was not true of the groin area shown on Contract Drawing No. 603/80,050 (Exhibit 45). With respect to the 930 feet involved between station 2247+50 and station 2256+80, the drawing (Sheet 2 of 4) provides:

"FILL CELLS OF GROIN SYSTEM AS DIRECTED." This was recognized by appellant's counsel at the hearing in the course of

and south ends of the project. The borrow area on this job was located more than a mile south of the south end of the project and placing all of the fill in the northern two-thirds of the project and two-thirds of the fill in the northern one-half of the project increased the average distance Appellant had to pump the hydraulic fill. This departure [28] from the contract increased the time of Appellant on the job and increased its maintenance and other costs because the wear and tear on pumps, boosters and other equipment is greater in direct proportion to the distance from the borrow area.

11. The Contracting Officer's decision was such that no responsible bidder can bid on work of this type if that decision is correct, because it permits the Contracting Officer at no additional expense to direct the placement of fill wherever he wishes when the placement of the fill is the key element in the amount bid by a contractor for this type of work. * * *

After reviewing the evidence adduced at the hearing, appellant's counsel states at pages 12, 13 of its posthearing brief:

The entitlement of Appellant to an equitable adjustment is clear unless the following defenses of the United States are found to be sustained:

1. Failure to give timely notice; [29]

2. Modification of contract as contained in the IFB at pre-bid conference; [30]

3. Lack of authority on the part of the Project Supervisor to depart from the

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cross-examining the contracting officer when the following exchange took place:

"Q. And he was to have a transition area at each end of 1,000 feet? And he was to have a groin area in which the contract officer was to have some (discretion) as to what was done in that area.

"A. Yes.

"Q. Otherwise he was to have a uniform cross section?

"A. Yes" (Tr. 115.)

[28] "15. Appellant's case for an equitable adjustment relating to the placement of the fill rests primarily upon the contract drawings showing the area to be covered, the typical cross-section shown on the drawings and Note 3 on the drawings, all of which indicate relatively uniform placement of the fill except in the transition and groin areas (Tr. 67, 68)." Appellant's Posthearing Brief, 5.

[29] In support of the position that the requirements of notice provisions are not waived by consideration of claims on the merits, the Government cites a number of cases none of which are recent (Brief in Support of Government's Answer, 7). Asserting that the cases cited by the Government are no longer the law, appellant's counsel quotes from our decision in *John H. Moon & Sons*, IBCA–815–12–69 (July 31, 1972), 79 I.D. 465, 498, 72–2 BCA par. 9601 at 44,876 in which we had cited *Dittmore-Freimuth Corp.* v. *United States*, 182 Ct. Cl. 507 (1968) (Pre-hearing Brief, 3).

The Changes clause construed in *Moon* did not involve a 20-day notice requirement, however, such as is contained in the Changes Clause with which we are here concerned (note 26, *supra*). The present clause was not adopted until 1968, when substantial revisions were made in Government construction contracts utilizing Standard Form 23–A. See *O. S. Hiestand, Jr.*, "A New Era in Government Construction Contracts," 28 Fed. B.J. 165 (1968); 5 Y.P.A. 473.

[30] The parties are apart on the question of whether in reaching its decision the Board should consider a conversation which took place between Mr. MacDonald and Government representatives at the pre-bidding conference. Favoring such consideration Government counsel cites our holding in *Korshoj Construction Co.*, IBCA–321 (March 15, 1965), 65–1 BCA par. 4731. Characterizing the contract as unambiguous, appellant's counsel asserts that the parol evidence rule precludes such consideration. Several decisions of this board are cited as supporting authorities, as is the recent decision of the Armed Services Board in *Fairchild Industries, Inc.*, ASBCA Nos. 16302 and 16413 (March 29, 1974), 74–1 BCA par. 10,567 at 50,083 ("The Government should not be heard to say that the contractor is bound by an interpretation stated at the pre-bid briefing, but not incorporated into the RFP by an amendment, when the RFP clearly provided that such statements will not be used in interpreting the contract. This provision was palpably designed to prohibit a contractor from using an oral interpretation in its favor. But it must be a two way street."). *Cf., R & R Construction Co.*, IBCA–413 and IBCA–458–9–64 (September 27, 1965), 72 I.D. 385, 65–2 BCA par. 5109.

contract, if in fact there was any such departure;[31]

4. Contracting officer had authority under SP-1(A)[32] to place the fill as he did;

5. Acceptance of Change Order No. 2 waived any right to the claimed adjustment.

With respect to item 5, we have previously called attention to the fact that at the time Change Order No. 2 was issued (May 18, 1973), the project supervisor estimated that approximately 320,000 cubic yards of the original 1,000,000 cubic yards of fill had been placed. Immediately thereafter the following colloquy ensued between the project supervisor and the hearing member:

[Q] * * * when the contractor gets Change Order Number Two which says he is going to add 250,000 cubic yards of material, what would preclude him from considering * * * that as representing * * * the material that was going to go to take care of storm damage on the Northern end—There would still be that balance of 1,000,000 original which could be distributed over the project * * *.

[A] Sir, it's very difficult to answer because at the point or at the time of the additional yardage, we asked for it because of the areas that we foresaw as being real trouble. We tried to get the pipeline and material through going up the beach. There was still two or three large embayments ahead of us and we had no idea how much material would be lost in trying to get through there.

[Q] Did he have any idea? Do you think he should have had any idea, any more idea than you had?

[A] No, sir.[33]

[31] The question of the lack of authority of the project supervisor to make contract changes was raised in the Government answer and a number of supporting authorities were cited. At the hearing no effort was made to show that the project supervisor was without authority to direct the placement of the beach fill as he had done. The record does show, however, that all of the fill covered by the contract was placed as directed by the project supervisor (Tr. 33); that the contracting officer was kept fully informed by the contract people at the site (Tr. 99); and that he was in accord with the interpretation reflected in the project supervisor's actions respecting the placement of the fill (Tr. 112–113; 117). The Govenment's posthearing brief makes no mention of the project supervisor being without authority to direct the contract work as he had in this case. We have therefore concluded that the Government has abandoned the lack of authority defense with respect to the claim asserted.

[32] See note 21, *supra*. Cited in opposition to the existence of any such authority are *Steenberg Construction Co.*, IBCA–520–10–65 (May 8, 1972), 79 I.D. 158, 72–1 BCA par. 9459, and *Carson Construction Co.*, IBCA–Nos. 21, 25, 28, and 34 (November 22, 1955), 62 I.D. 422, 434 ("* * * To be approximate, however, the lines would have to be close to or near to the elevations indicated on the plans, for it is in these terms that the dictionary defines the term 'approximate' * * *."). (Appellant's Pre-hearing Brief, 4.)

[33] Tr. 182, 183. In his opening statement Government counsel asserts: "* * * By reason of these storms the government's position (is) that it ordered the 250,000 extra cubic yards in order to repair storm damage. The great majority of which was in the northern part of the project." (Tr. 10.) At the time the findings were made the contracting officer considered the claim was based upon the 250,000 cubic yards covered by Change Order No. 2 (Tr. 112). The claim for equitable adjustment in the amount of $300,000 involves approximately 400,000 cubic yards of fill that the appellant contends was misplaced (Tr. 78; Appellant's Exhibit No. 1; Appellant's Post-hearing Brief, 6, 16).

Adverting to the quantity involved in the claim in his opening statement, appellant's counsel states: "* * * we are not talking about any kind of minor * * * variation which would have to be in any kind of matter of this kind. We are not involved with that. We want to make it very plain that if it were a question of rule or [*sic*] reason we would not be here. This is our investigation of the matter indicating to us that approximately 300,000 cubic yards out of a contract of 1,250,000 were placed beyond what would have been a reasonable equality in the northern two thirds of this project." (Tr. 8.)

No explanation has been offered by appellant for the difference of 100,000 cubic yards between the 400,000 figure comprising the claim according to appellant's posthearing

In its posthearing brief the Government asserts that no fill was placed in the southern one third of the job because of equipment failures [34] and because sand was placed in this area by "natural oceanic processes." [35] The importance the Government attaches to the latter concept is apparent from the contracting officer's testimony in which he stated:

> A. We contemplated that there would be sand over the entire project. But the contemplation took into consideration the dynamics of the ocean.[36] We knew from previous studies in the area. From studies that are continuing yet. That the ocean does in fact carry the sands to the south. We have a great deal of build up by mother nature in that section. This was all taken into consideration. Not only were we going to do contract work but at the same time mother nature was going to be doing [her] share of it.[37]

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brief and the 300,000 cubic yards claimed for in the opening statement. The answer may be that the lower figure is the result of applying the "rule of reason" to the circumstances involved in this case (*e.g.*, the area where the contracting officer was clearly vested with a considerable amount of discretion (note 27, *supra*) or where the appellant has recognized that consideration would necessarily have to be given to factors which would affect the amount of fill to be placed in particular areas of the project (note 51, *infra*).

[34] Government's Posthearing Brief, 1. Mr. Riddel testified that the reason virtually no fill was placed on the southern one-third of the job was partially attributable to equipment failures (Tr. 155, 163–165). Mr. MacDonald acknowledged that the equipment broke down a number of times but he considered that the breakdowns were largely the result of the long lines, the great distances the contractor was pumping at the time the breakdowns occurred (Tr. 30; 35; 55; 185). Mr. Jantzen testified that the equipment the contractor had on the job was of sufficient capacity to perform the work (Tr. 81). Mr. A. H. Meyer who was the contractor's superintendent for most of the time the project continued and who testified as a Government witness characterized the equipment as "adequate for the job." (Tr. 139.)

The Government appears not to have recognized the anomaly involved in asking the Board to find in effect that no fill was placed in the southern one-third of the job because of equipment failures where, as here, one of its witnesses testified that the contractor's equipment was adequate (Tr. 139), and another of its witnesses testified that it was not (Tr. 155, 163–165). We need not determine the legal consequences to a party proffering conflicting testimony, however, for in this case the appellant has clearly established that its equipment was adequate to perform the work called for by the invitation for bids and the resulting contract.

[35] The term used by the contracting officer is "the dynamics of the ocean." (Tr. 119, 122.) The project supervisor refers to the "natural transfer of material." (Tr. 164.) The "natural oceanic processes" language employed by Government counsel was apparently designed to be a generic term embracing not only the "dynamics of the ocean" and the "natural transfer of material" terminology but wave action in the surf zone and littoral drift as well.

[36] In support of the contracting officer's use of the term, the Government points to a note on the contract drawing (Sheet 2 of 4) reading: "FILL TO BE ACCOMPLISHED BY NATURAL WAVE ENERGY PROCESS." (Exhibit 45; Drawing No. 603/80,050.)

Appropos of the notation Mr. MacDonald stated: "* * * That would indicate to me that we would pump this part * * * with the dredge line. The flat part. But what runs down here say 30 to one. This is sloping away and into the ocean and perhaps underneath the ocean. We are not to make an effort to going down there and spreading that so it looks like a straight line. But let the ocean take its natural repose." (Tr. 69, 70.)

[37] Tr. 119. Upon cross-examination, the project supervisor testified as follows:

"[Q] * * * What does the concept of the surf zone have to do with whether you ever get any fill down in this area, whether the contractor places any or not? What does that got to do with it?

"[A] Sir, if we had started as the original conditions of the contract and the contractor had gone to the extreme Northern limits and had started pumping his 100 foot berm, he is taking a risk in that, and this is his

Continued

The question of the extent to which the terms of the invitation for bids and the resulting contract alerted bidders to the Government's reliance upon the "dynamics of the ocean" or similar concept for distribution of fill [38] was fully explored at the hearing. The following exchanges occurred involving the contracting officer, the hearing member and Government counsel:

[Q] * * * You are the man that everyone ultimately looks to * * *. What would be the effect in your opinion showing the project 10,000 odd feet and showing an AA typical cross section with a [berm] of let's say 100 feet in respect to the requirement that you spread so many * * * cubic yards of sand * * * would you as a bidder assume that * * * basically that sand was to be spread over the entire project? And bid on the basis [of] the fact that he would be coming up with one price covering the 10,000 odd feet?

A. If you were to proceed on the basis of the information contained in the RFB, I think that would be a fair assumption.

However, we ask the bidders to visit the site prior to bidding to become familiar with the area. To become familiar with some of the conditions in the area. * * *

* * * * *

[Q] * * * Aside from the pre-bidding conference, however, * * * any answers that were given * * * to your knowledge in the plans or the contract that you can recall that would have made a contractor leery about assuming that he is going to spread this sand over the 10,000 odd feet? And build it basically in accordance with the typical AA cross section?

* * * * *

A. * * * I would have to say that I don't believe there would be anything to that extent.

* * * * *

Mr. Spillman: There is a note on one of the drawings to the effect that fill is to be accomplished by natural wave energy process. Does that mean anything in particular to you?

A. Just what we pointed out here a minute ago. That you had to know the conditions (at) the site. You had to take into consideration the dynamics of the ocean. The inner and outer bars and the things that were going to (affect) the project.

[Q] Was there anything in the invitation that indicated that the dynamics of the ocean was going to be a factor?

A. I don't believe there would be. But there are a lot of provisions there.

[Q] * * * the materials in the record. But I am examining you as a contract

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Continued

risk at bidding. You tell him this varies, the energy varies, the embayment varies. When he pumps this section——

"[Q] Wait a minute. Where do you tell him? You just said some things—Where do you tell him?

"[A] You tell him that he goes——

"[Q] How? In writing? How do you tell him?

"[A] It's in the specifications that the contractor will begin pumping from North to South, he goes all the way to the North end of the job.

"[Q] Agreed.

"[A] Alright. And he starts his pump at this point.

"[Q] Agreed. Where do you tell him * * *?" (Tr. 158, 159.)

[38] Mr. MacDonald testified that with respect to the earlier contract (notes 3 and 4, *supra*) the view had been advanced that "the best way of doing the job would be to place it all in the north end" (Tr. 20).

An accommodation was apparently worked out which permitted the Government to vary the fill from what was shown in the contract. Mr. MacDonald gave the following explanation for the informal agreement reached: "* * * the man who came at that time * * * indicated, he had a note, that fill will vary. By varying it they meant they will put more of it on the north than the south. At that time the * * * fill was so small, the amount of deviation say from center was so small, I did not argue it. I went ahead and did this work * * *. We do not make an issue of every tiny deviation from what we thought we should be doing." (Tr. 62, 63.)

officer to what your reaction is to this situation.

A. I don't think we had any particular warning as such in the IFB. * * * [39]

The contracting officer and the Government officials involved in administering the earlier contract (note 38, *supra*) were not the only ones who considered that "natural oceanic processes" should be taken into account with respect to the distribution of the beach fill. This was also the position of the project supervisor [40] and others involved with him [41] in a serious study of the area. (See Government Exhibit A; 1973 Buxton Beach Nourishment Project, An Annotated Photographic Atlas, Cape Hatteras National Seashore, North Carolina; Coastal Research Associates,[42] Charlottesville, Virginia, February 1974; NPS Contract No. CX 5000031059, Robert Dolan, Bruce Hayden, Preston Riddel, John Ponton.) Of particular interest to this discussion are the following comments from page 8 of the annotated atlas:

> During the months before the dredging at Cape Point and the discharge of sand onto the Buxton beaches, procedures for implementing the nourishment project were formulated. The ensuing strategy stressed the discharge of sediments onto the active portion [69] of the beach, permitting the natural fluid motions of the swash and inshore currents to distribute the borrow material.
>
> National Park Service scientists and technical personnel agreed that an elongated and sloping beach of natural, morphological characteristics was most desirable and that this end was best achieved by permitting natural forces to organize and distribute the sediments discharged along the beach. Although the winter storms of January, February, and March of 1973 and technical delays and breakdowns precluded strict adherence to the proposed discharge schedule, the essence of the strategy for nourishment was fully adhered to.

Even if the devastating storms of February and March of 1973 had not occurred, it appeared that the project supervisor considered that the contractor ran at least some risk

[39] Tr. 119–123.

[40] Note 37, *supra;* Tr. 156–165. Mr. Riddel testified that the completed beach was the result in part of the "natural transfer of material." Asked whether a contractor could plan a job based upon the "conduct of the wave action," Mr. Riddel responded by stating: "He bid the job on the conduct of his people and the efficiency of his equipment." (Tr. 164.)

[41] As shown in the text, Mr. Riddel was listed as one of four persons involved in the preparation of the annotated photographic atlas of the project. Prior to being project supervisor on the instant contract, Mr. Riddel had been assistant superintendent at Cape Hatteras for 6 years. During that time he had supervised the project supervisor on the earlier contract awarded to the appellant (Tr. 149).

[42] Concerning Coastal Research Associates, Mr. Riddel stated: "That is out of the University of Virginia, that's Doctor Robert Dolan." (Tr. 176.) He also stated that Dr. Dolan was a research consultant for this job; that he had been a consultant at Hatteras with respect to beach dynamics for over 10 years; and that he had reviewed the plans and specifications for the instant contract at the time they had been prepared (Tr. 176, 177).

[43] Responding to an inquiry upon cross-examination, Mr. Riddel stated: "* * * All bidders were given the opportunity to visit the site before bidding at the time of the pre-bidders site investigation. It was quite apparent that the more unstable beach, the more dynamic beach, the one receiving continued erosion, was on the Northern limits. This was apparent to all contractors." (Tr. 160.)

Commenting upon the conditions created by the February and March of 1973 storms, however, Mr. Riddel had stated: "* * * It was a different beach than he and his representatives had seen." (Tr. 154, 155.)

that the typical AA cross section might not be attainable for the entire area shown on the contract drawings. Upon cross examination he stated:

> **A. * * * Now wait. He starts at this point pumping and puts on a 100 foot berm that you had on the typical section. Any embayment that he hits as he comes down through here, he is still working with this basic profile into the ocean. He has got a point line down here. It can be that between this 100 foot station he can put in 10,000 cubic yards or he can put in 20,000 cubic yards because you do not know, from day to day, on an unstable or highly dynamic beach [44] what happens in here.[45]**

Elsewhere in his testimony, Mr. Riddel characterized the area in question as "highly dynamic, probably one of the most dynamic areas of the whole Eastern Seaboard" (Tr. 148). The difficulty of predicting how the "natural transfer of material" (note 40, *supra*), would occur on so "highly dynamic" a beach may have been the reason the National Park Service solicited bids on three different quantities of sand (750,000 cubic yards, 850,000 cubic yards and 1,000,000 cubic yards)[46] without any difference in "the design of the beach" and utilizing "the same drawing in all cases." (Tr. 17.)[47]

The parties have sharply divergent views as to the extent of the contracting officer's authority to direct the placement of the fill, insofar as the directed placement represents a departure from the typical AA cross section shown on the contract drawings, without an equitable adjustment being made for any addi-

[44] The "unstable" or "highly dynamic" nature of the beach was apparently a weighty factor in determining whether the project should be continued following the February 10–12, 1973, storm. Asked by the hearing member to explain his reference to pressures, Mr. MacDonald stated:

"What I meant was there was very high feelings from both directions. The local inhabitants were very much concerned that the job would be cancelled, that they would then be abandoned, so called, to the sea. But there was also at the same time, apparently not so much in the Park employees that I spoke with, but apparently the Park Superintendent, he would prefer to abandon it as—It was in the paper * * * I read his opinion—that it was wasteful, that until they came up with a better method of doing this that they should not do it. But I don't feel that our mobilization was necessary to stop during this period while they decided whether this was a wasteful type of operation; the whole idea of replacing sand, that perhaps some other method of controlling the beach was better. This is what I mean by unreasonable. We had plenty of work to do that we could have proceeded with our work. It would not be related to the damage in the North end until it could be taken care of, as it was, under Change Order Number One." (Tr. 190, 191.)

[45] Tr. 159. This testimony followed immediately after the colloquy set forth in note 37, *supra*.

[46] For the three quantities specified, the contractor submitted unit price bids of $1.50, $1.40 and $1.31, respectively (Exhibit 45; Invitation For Bids No. 5000–1 (73); Tr. 17).

The reason the Government asked for bids on three different quantities may have been related to the question of what quantities could be obtained with the funds then available. The appeal file contains what appears to be an earlier version of the same invitation which is dated August 20, 1972, and which under "Description of Work" provides: "Remove approximately 1,000,000 cubic yards of material from a designated borrow area and place as beach nourishment." This statement is followed by "Estimated Price Range: $1,500,000 to $2,000,000." (Exhibit 45)

[47] Referring to his experience with the Corps of Engineers Mr. MacDonald stated: "* * * where they order * * * a different quantity, they will show a [different] design for each schedule or quantity." As to the reasons for this he stated: "* * * it would be virtually impossible to build identical beaches in all cases with different quantities and have it all the exact same dimensions." (Tr. 17, 18; 53.)

tional costs involved. Cited in support of the appellant's position that the AA cross sections govern the placement of the fill is a note upon the contract drawings which reads as follows:

3. THE WESTERN EDGE OF THE FLAT BERM IS THE ELEVATION 10.5 CONTOUR THROUGHOUT THE TOTAL LENGTH OF THE PROJECT. THE FLAT BERM IS TO BE 100' WIDE EXCEPT IN THE 1000'-LONG TRANSITIONS AT EACH END OF THE PROJECT WHERE THE WIDTH OF THE FLAT BERM WILL DECREASE UNIFORMLY FROM 100' TO ZERO.[48]

At the hearing, the Government acknowledged that the drawing contemplated that the contractor would place fill over the entire 10,200 feet of the project (Tr. 115). It also acknowledged that except for the two transition areas at each end and the groin area, this would entail placing the fill in accordance with the uniform cross section shown on the contract drawings (Tr. 115, 124, 153–154, 161). According to the project supervisor the drawings depicted the dune line at the time of bidding which would be the "batter board, the heel * * * for the placement of fill at the elevation 10.5." (Tr. 144, 145.) Following the February and March 1973 storms, however, it was no longer possible to proceed as contemplated from station 2228 northward. This was because the dunes—upon which placement of the sand in accordance with the AA cross section was based—had been washed away or pushed across the highway onto private lands, while the Government lands[49] at Cape Hatteras, which the contractor's pipeline was to traverse, were under water.[50]

While conceding[51] that in ordi-

[48] Exhibit 45; Drawing No. 603/80,050 (Sheet 3 of 4). The same drawing (Sheet 2 of 4) shows that the beach involved in the Groin System between Station 2247+50 and 2256+80 (930 feet) is to be filled "AS DIRECTED" and designates Station 2266+80 as "END PROJECT." Page 35 of the annotated photographic atlas (Government Exhibit A) refers to "the south end of the project at station 2235+00 * * *." The difference is 3,180 feet.

[49] Both the contracting officer and the project superintendent refer to the legal problems precipitated by the inundation of the Government lands on which the beach was to be constructed and over which the contractor's pipelines and equipment were to pass (Tr. 110, 111; 143).

In response to a question as to why the stop order was issued in March of 1973, the project supervisor stated: "We were evaluating what we could do. Perhaps the first major question was the legal implication that we were bound in spending money, or Government appropriation, on Federally owned lands, and Federally owned lands, at that point, were submerged lands, that the high tide line perhaps went onto private property some 40 or 50 feet * * * (Tr. 142, 143)."

[50] Tr. 22, 49 (MacDonald); Tr. 96 (Ingram); Tr. 154, 155 (Riddel). At one point in his testimony Mr. MacDonald indicated that the typical AA cross section could have been adhered to in the Northern section even after the storm. This assessment was made, however, without knowing whether it would be possible to achieve the 10.5 elevation shown on the contract drawings and stay on Government land (Tr. 48–50). That it was not in fact possible to do so appears to have been recognized by appellant's counsel in his cross-examination of the contracting officer (Tr. 116).

[51] Tr. 153, 154. At page 6 of the Posthearing Reply Brief Appellant's counsel states: "* * * The Jantzen drawings prove where the fill was actually placed and that there was sufficient fill to construct a 100 foot berm over the entire project even with the variations in the bottom on which the fill was placed. The Jantzen drawings show that the contract could have been followed by the United States notwithstanding the changes brought about

Continued

nary circumstances [52] the beach fill would have been placed in accordance with the typical cross section shown on the contract drawings, the Government contends that there were a number of factors which should have alerted the contractor to the fact that the Government had the right to vary the placement of the beach fill from what was shown on the drawings to meet the changed conditions [53] encountered. Among the factors relied upon by the Government to support its position are (i) notations on the contract drawings,[54] (ii) what an adequate site inspection should have purportedly revealed,[55] and (iii) the answer given to a question raised by the appellant at the prebidding conference.[56] The Government also points to the contractor's acceptance of Change Order No. 1 [57] and Change Order No. 2,[58] as well as to the fact that under SP–8 of the Special Provisions (note 15, *supra*) it had the right to increase the contract quantity by 25% at the contract unit price.[59]

Both parties agree that the contractor was required to build a "uniform beach." [60] In the contractor's view this was done by building the

Continued
by the several storms during the contract period."

Earlier at page 3 of the same brief appellant's counsel had stated: "No doubt wave action in the surf zone would affect the project to some extent but it would obviously not change the job to the degree it was changed at the instance of the United States in this case." See also note 50, *supra*.

[52] The project supervisor gave the following testimony on cross-examination:

"A. If he has a normal beach with a normal sea that you would anticipate, he should have, with a 1,000,000 yards, before the major storm, been able to get completely down the beach.

"Q. And that's what he bid on. Agreed?

"A. That's what he bid on." (Tr. 159, 160.)

[53] Both parties have used terms such as "changed conditions" or a "change in conditions" in referring to the havoc wrought by the storms of February and March of 1973. Neither party has treated the claim asserted as cognizable under Clause 4, Differing Site Conditions, of the General Provisions (Exhibit 45; Standard Form 23–A, October 1969 Edition).

[54] Notes 24 and 36, *supra*, and accompanying text.

[55] Note 43, *supra*. At the time of bidding there was less beach visible in the northern section (Tr. 51). The fact that the northern section had significantly less beach to begin with probably accounted for the greater amount of storm damage in that area (Tr. 117, 118).

[56] Note 5, *supra*; Tr. 120.

[57] See note 12, *supra*, and accompanying text.

[58] Exhibit 26; Change Order No. 2 dated May 18, 1973. In the findings (Exhibit 12) the claim for misplacement of fill is discussed under the caption "Additional Compensation based on Change Order No. 2." At page 3 the contracting officer states: "* * * The additional 250,000 cubic yards of beach nourishment was ordered after a major change in conditions resulting from a storm on February 10–12, 1973, necessitating alteration of the basic design cross-section. * * *"

Queried upon cross-examination as to what was involved in the "alteration of the basic design cross-section," the contracting officer referred to paragraph 2 of Change Order No. 1 (note 12, *supra*; Tr. 112).

[59] Exhibit 12, Findings 2–3. Prior to exercising the Government's option the contracting officer called Mr. MacDonald on the telephone to tell him of the contemplated action and the contractual basis for it. The contractor's letter accepting the increase was written as a result of this telephone conversation (Exhibit 27; Tr. 23–25).

[60] The contracting officer testified that a uniform beach "would be uniform in its appearance from north to south. Not having the ins and outs of the beach profile. Uniform by appearance, by design, by construction. Having a uniform berm, having a uniform elevation." (Tr. 114.)

Mr. MacDonald testified that the beach was not uniform when pumping was completed on September 19, 1973. When Government counsel showed him a photograph contained in the record and dated September 28, 1973, he stated: "In this picture there does not appear to be any place that is not uniform." (Tr. 40.)

beach in accordance with the contract drawings.[61] The contractor's expectations were not realized, however, as is clear from the following testimony given by Mr. MacDonald upon cross-examination:

Q. * * * the typical cross section was followed throughout the contract?

A. * * * the typical AA was not followed throughout the project. Yes sir.

Q. Where was it not followed?

A. For the most part it was not followed anywhere. It was exceeded in the northern portions and far underdone in the southern portions. In some cases not at all in the southern portion. (Tr. 39, 40.)

* * * * *

Q. Is it not a fact that large quantities of the sand that you placed in the northern part of the project did eventually wind up on the beach of the southern part of the project.

A. I do not know that for a fact.

Q. Would you categorically say that this is not a fact?

A. I'll say that when we finished the project there had been a hurricane offshore and after this hurricane, when I did ride this project for the last time, it looked (uniformly) done and there was plenty of fill along the southern end and among the groins but we did not place it there.

Q. But it got there.

A. Yes, sir, it did. (Tr. 42, 43.)[62]

Appellant's witness MacDonald testified that after the decision on his claim had been rendered and at the time of the final inspection of the job, he had asked the contracting officer as to the basis for the decision. The contracting officer is said to have responded by stating that the contractor could be directed to place the fill anywhere within the limits of the job and that the contractor could have been required "to place it all in the extreme northern end." (Tr. 36, 37.) The contracting officer confirmed that he had had a

[61] See text accompanying note 48, *supra*. In paragraph 9 of the Complaint the appellant asserts that two-thirds of the fill was placed in the northern one-half of the project and all of the fill was placed in the northern two-thirds of the project. The contract drawings show the project as beginning at Station 2164+80 and continuing south for 10,200 feet. One-half and two-thirds of the distance down the project would result in locations the equivalent of Station 2215+80 and Station 2232+80, respectively. The appellant placed fill as far south perhaps as Station 2238 (Tr. 31).

The 5,100 feet located in the northern half of the project is comprised of 1,000 feet transition (2164+80 to 2174+80) and 4,100 feet full berm (2174+80 to 2215+80). Hence, approximately 56.40% of the 7,270 feet of full berm shown in the contract drawings is located in the northern half of the project.

The 3,400 feet comprising the southern one-third of the project consists of 1,470 full berm section (2232+80 to 2247+50), 930 feet in the groin area (2247+50 to 2256+80) and 1,000 feet transition (2256+80 to 2266+80). Accordingly, slightly more than 20% of the 7,270 feet of full berm depicted on the contract drawing is located in the southern one-third of the project.

[62] The Government does not deny that changes in the manner of proceeding had to be made as a result of the storm. This is evident from the testimony elicited from the contracting officer on cross-examination:

"Q. * * * Alteration of the basic design cross section(,) was there any alteration made?

"A. I think there had to be an alteration to continue. We didn't have what we had in the initial stages of the project. We had lost the barrier (dunes).

"Q. What was it about that * * * that required an alteration of the basic design cross section?

"A. * * * for the contractor to proceed with his pumping operations, we had to change the direction, we had to change the method in which we told him he could build a protective (berm) for his pipe his equipment. These are the kind of changes we referred to. I don't think we changed the beach in that we were not still calling for a uniform beach nourishment project. We were calling for that and would continue to call for that." (Tr. 113.)

conversation with Mr. MacDonald on the occasion cited but he was unable to recall telling him that the United States had a right to have the fill placed anywhere it wanted within the project limits.[63] Similar views were said to have been expressed to Mr. MacDonald by the project supervisor.[64]

Mr. MacDonald also testified at some length with respect to the bid on which the contract was based. The bid submitted was predicated upon the specifications and plans received and took into account the location of the borrow area, the pipeline routes and fill areas as shown or indicated on the plans, as well as the length of lines to transport the fill. The full section of the project between Station 2174+80 to Station 2247+50, as depicted[65] on the typical AA section shown on the contract drawings, was singled out for special mention by Mr. MacDonald (Tr. 12–17).

At the time of bidding the beach was eroded badly but erosion was generally uniform down the beach with no obvious pocket or hole. In the northern section there was less actual beach visible and probably none visible at high tide. Mr. MacDonald had no recollection, however, of seeing any large embayments in the northern section that had to be filled in (Tr. 51).

The final location of the sand is only of academic interest to the prospective contractor. As a bidder the contractor is interested in the placement of fill because that is what will cost him money. On a unit price contract where, as here, some 10,000 feet of beach is involved, the bidder must consider the cost of the entire job and average out its costs to come up with a single unit price.[66] Where the distance the fill has to be transported from the borrow pit is a significant cost factor, the contractor may break even at the mid-point while performing at a loss or a reduced profit past the mid-point and at a profit or at an increased

[63] Tr. 126, 127. In its Posthearing Brief at pages 11, 12, appellant's counsel states: "* * * Appellant accepted the decision of the United States to construct the beach as it did after calling the departure from the contract to the attention of Mr. Riddel since it was the feeling of Appellant that the protest would be unavailing as the United States was not going to change its course in any event * * *."

[64] After Mr. MacDonald testified that the beach as constructed was constructed differently from the cross section, the following exchange occurred between him and appellant's counsel:

"Q. Were there any reasons given by the contracting officer or his representative as to why that was so?

"A. The only reason we had was that the contract called that they could do whatever they wanted to as long as they kept it within the limits of the job. This was the best way and the way they wanted it done. This is the way they were going to have it done.

"Q. Who told you that?

"A. This was the indication I had from Mr. Riddell at any time I asked him why we were doing it this way." (Tr. 36.)

The parties agreed that the contract as performed resulted in a very good job (Tr. 54; 148).

[65] In response to a question from the hearing member, Mr. MacDonald noted that the size of the rectangles shown on the contract drawings with respect to the flat berm were quantitative indications of the amount of sand to be placed in the area and that he had taken these indications into account in submitting his bid (Tr. 68, 69).

[66] "* * * on this job, most jobs, where you have a single unit cost there is a portion of the job that you actually do at a loss. There is no profit. In some cases considerable loss." (Tr. 66.)

profit up to the mid-point, measuring distances from the designated borrow area (Tr. 65–67).

In his testimony, Mr. MacDonald stressed the significance of the location of the borrow area [67] to the contractor's operation from the cost and production standpoint. He characterized the sand as a very heavy mixture of shell and small gravel almost, noting that the further away you get from the borrow area "your production goes way down and your expenses go way up." Distance as a significant cost factor was related to sand having to be transported through velocity and agitation of the water and these decrease as you get further away from the borrow area with the result that income goes down, while the increase in pressure required to go longer distances greatly increases the wear and tear on the pipes and pumps (Tr. 29, 30).[68]

Both parties have attempted to buttress their respective cases by citing a provision from the specifications reading as follows:

3–3 FILL PLACEMENT: The Contractor shall:

* * * * *

J. Control the net in-place yardage of fill material per linear foot along the beach to that which is needed to provide the volume per linear foot as directed. Since the slope that the material will assume, and the distribution of the material below mean low water cannot be predetermined, the Contracting Officer may make alterations in the plan dimensions and/or slopes as work progresses.[69]

After referring to Special Provision 1 (note 21, *supra*), Specification 3–3A[70] and the above-quoted provision, appellant's counsel states: "The obvious purport of all these provisions taken together with the contract drawings is to provide a more or less uniform distribution of the fill over the 10,200 feet of the project with the only exception being the transition areas at either end and the groin area * * *" (Posthearing Brief, 12). Commenting upon the uniform distribution of fill argument, Government counsel states: "* * * The contract drawings indicate that the contractor was to build a uniformly wide beach, rather than uniformly distribute fill along the length of the

[67] Paragraph 9 of the Complaint states: "* * * The borrow area on this job was located more than a mile south of the south end of the project * * *." This statement is admitted in the Government's Answer.

[68] "* * * it requires more pressure to go longer distances. As pressure goes up, like on a square, causing wear and tear on the pipes and pumps. So that something wear(s) out not [twice] as fast and uses twice as much pressure but maybe ten times as fast." (Tr. 30.)

"Also as a rule, the longer the line, like a chain, the more chances are that it is likely to break. You take more pumping hours but it takes longer to get the same number of pumping hours. Because breakdowns are more likely to occur and failures in the long chain." (Tr. 35.)

[69] Exhibit 45; Hydraulic Beach Fill (Beach Nourishment), Sheets 2 and 3 of 4.

[70] "3–3 FILL PLACEMENT: The Contractor shall:

"A. It is intended that the dredge discharge and discharge points shall be manipulated and controlled by the Contractor in such manner that a minimum of shaping by mechanical equipment will be required to construct the fill sections within allowable tolerances as shown on drawings."

* * * * *

"C. Plan the work for one continuous operation in a generally north to south direction." (Note 69, *supra*, Sheet 2 of 4.)

project. This is consistent with the specifications requirement to 'control the net in-place yardage of fill material per linear foot along the beach to that which is needed to provide the volume per linear foot as directed.' * * *" (Government Posthearing Brief, 2, 3.) Upon cross-examination the contracting officer expressed the view that in interpreting the provision consideration should be given to circumstances that go beyond the statement itself. These were identified as the conditions at the site resulting from the "great losses of sand in the northern end" and the "loss of the (barrier dune)" (Tr. 128, 129).

A major question in the case is whether a timely protest was made concerning the project supervisor's actions with respect to the placement of the fill. Mr. MacDonald testified that early in August, or at the end of July (when his project superintendent was leaving), he had become aware that there would not be enough fill to go to the south end of the project. Prior to that time, Mr. MacDonald had made an oral protest to Mr. Riddel in which the following points had been made: (i) there was a lot of sand going in the northern end of the project, (ii) the longer lines were costing the contractor money, and (iii) for the contractor to make any money it would be necessary to get on the shorter line (*i.e.*, on the southern end).[71]

Mr. Riddel confirms that Mr. MacDonald had said something about the job costing him money but Mr. Riddel had not interpreted the statement as referring to placement of material "because we * * * tried to assist him in every way possible, allowing him to pump South to North and even (allowing) him to back up completely * * * on his pipeline more than 2,000 feet to pump in an area just because he could get some production from his equipment.* * *" (Tr. 172.) Moreover, Mr. MacDonald did not say anything forceful, such as: "I do not like what you are doing" or "I don't want to do it that way." (Tr. 172.)

It is clear that the contracting officer considered the contractor's protest to be belated. Responding to a question from the hearing member, he stated:

> The thing that surprises me most is that if indeed we did mislead the contractor in any way, if indeed we made (an) interpretation he could not agree with it came at a mighty late hour. When it comes in August. At almost the termination of the project. After we had issued Change Order Number One and Two.
>
> * * * * *
>
> But if there were all this dissatisfaction, this misinterpretation this misunderstanding that is generally now being conveyed. Why did we not know about it

[71] Tr. 33, 34; 46, 47; 187. See also note 20, *supra*. Mr. MacDonald viewed Change Order No. 1 in the following terms: "* * * The Change Order as I read it says to follow the plan as much as possible throughout the project * * * I do not feel that at any time that there was a description or change order established to me that this was a change in the job. That instead of doing the southern portion they were going to do more in the northern. This I do not know at any point that anyone told me this." (Tr. 48.)

at an earlier hour. That disturbs me. (Tr. 125, 126.) [72]

Decision

In the course of deciding the claim for the alleged misplacement of beach fill, we shall have occasion to rule upon the contentions of the parties respecting (i) the timeliness of notice; (ii) the consequences to be attributed to the appellant's acceptance of Change Order No. 2; (iii) the application of the parol evidence rule; (iv) the nature and extent of the Government's authority to direct the placement of the fill; (v) the construction to be placed upon a typical cross-section shown on the contract drawing; and (vi) the relationship between the Changes clause and the estimated quantity provisions.

Timeliness of notice.—With respect to item (i), we note at the outset that written notice of the claim was given by the contractor in a letter dated August 15, 1973 (Exhibit 19). This was 5 weeks before the contract was determined to be substantially complete on September 19, 1973 (Exhibit 14), and over 3½ months before final inspection and acceptance occurred on December 5, 1973 (Exhibit 9). As previously noted, an oral protest had been made to the project supervisor in early August or at the end of July.

Unlike many cases involving a timeliness of notice question, there is here no one action [73] by the Government upon which the claim is predicated. It is rather a case of a series of actions occurring over a considerable period of time having undermined the basis upon which a single unit price for the total contract quantity had been predicated (*i.e.*, averaging of costs for distribution of fill over the entire 10,200 feet of the project) without the contractor having become aware of the problem until comparatively late in the project (note 20 *supra*).

To a considerable extent the project supervisor's actions in directing the placement of the fill were dictated by the conditions encountered as the work proceeded. Although he had access to detailed records and much greater experience in the Cape Hatteras area than did the contractor, the project supervisor was unable to assess the impact of the devastating storms of February and March of 1973 upon the distribution of fill at the time Change Order No. 2 dated May 18,

[72] With respect to all three claims, only the matter of entitlement is presently before us for resolution (Stipulation of Counsel dated March 21, 1974).

[73] Compare, for example, *John H. Moon & Sons*, note 29, *supra*, where the Government's action on which the borrow claim was based was the resident engineer's disapproval of a borrow pit proposed for use by the grading subcontractor. In *Moon* the written notice of claim was given to the contracting officer over 4 years after the refusal of the resident engineer to approve the proposed borrow pit. By the time the formal claim based upon that refusal was presented to the Government, the contract had been completed for approximately 2½ years. Before the case was heard the resident engineer whose decision was being questioned had died. We denied the claim on the ground that the failure to seek review of the resident engineer's decision before proceeding to incur the costs embraced within the claim had foreclosed the Government from exercising options it otherwise would have had.

1973, was issued (text accompanying note 33, *supra*). Less than 3 months later written notice of the claim was given (Exhibit 19).

The nature of the oral protest to the project supervisor left much to be desired, assuming it was intended to dissuade the Government from continuing the course it had adopted in directing the placement of the fill. There is considerable evidence to indicate, however, that the actions the Government took, or failed to take, in the wake of the severe storms of February and March of 1973, contributed to and may even have been the principal cause of the delayed assertion of the claim. Mr. MacDonald stressed this aspect of the case in his testimony (note 20, *supra*).

According to the Government's witnesses the severe storm damage occurred in the northern end of the project and the contractor either knew, or should have known, that all or most of the 250,000 cubic yards of sand covered by Change Order No. 2 would be required to be used as beach fill in that area to repair the storm damage. The project supervisor testified that 500,000 cubic yards of sand were lost in the northern end of the project from the February 10–12, 1973, storm alone. The Government failed to offer any evidence to show the approximate time when the contractor was informed that sand losses of this magnitude (*i.e.*, one-half of the original contract quantity) had been sustained in the northern end of the project during the February storm. Mr. MacDonald's testimony that he remembers "someone saying, something like 500,000 cubic yards" (note 10, *supra*), has no time frame. For aught that appears in the record, he may have obtained this information in the conversation held with the contracting officer when the job was finally accepted in December of 1973 or conceivably at some later time.

While the contracting officer testified that "[t]he 250,000 cubic yards was necessary to replace yardage lost during the storm" (note 16, *supra*), he failed to explain how it was possible to replace 500,000 cubic yards of sand with 250,000 cubic yards of sand; nor did the project supervisor offer any explanation. The latter's statement that the Government "desperately needed more yardage for that Northern sector" is related not only to the 500,000 cubic yards lost in the February storm but the substantial additional quantities of sand lost in "a three day Northeaster starting the 19th of March" (note 10, *supra*).

On this record we are not in a position to find that the Government withheld [74] information to which the contractor was entitled for we have no way of determining when the information was furnished. We

[74] See *Power City Electric, Inc.*, IBCA–950–1–72 (November 27, 1973), 80 I.D. 753, 768, 74–1 BCA par. 10,376, at 49,005, where the Board stated: "* * * The courts and the Boards have taken an increasingly stringent attitude toward the withholding of information the disclosure of which would be likely to have a material effect on a contractor's estimate of costs * * *. On balance, the appellant's fault was less serious than the Government's fault." (Footnotes omitted.)

note, however, that the Findings of Fact pertaining to Change Order No. 2 refers to the "obligation of the Government to repair storm damage conditions" [75] after which it refers to the contract being expanded by 250,000 cubic yards (note 17, *supra*). The record does not reveal whether a copy of these findings was furnished to the contractor at the time Change Order No. 2 dated May 18, 1973, was forwarded for execution. Assuming that it was, however, the contractor would appear to have been warranted in concluding that the 250,000 cubic yards of sand added to the contract by the Change Order represented the Government's assessment of the amount of storm damage that had occurred up until that time.

[1] The terms of the Changes clause with which we are here concerned (note 26, *supra*), provide that the contracting officer must be given written notice of any claim asserted under paragraph (b) and that "except for claims based on defective specifications, no claim for any change * * * shall be allowed for any costs incurred more than 20 days before the Contractor gives written notice as therein required * * *." In consideration of the purpose to be served by the clause, the various boards have not hesitated to deny claims where the contractor has failed to give timely notice as required by the Changes clause or by the comparable provisions contained in the Suspension of Work [76] clause. We find, however, that the 20-day notice provision of the Changes clause should not preclude consideration of a claim on the merits where there is no one action of the Government which can be pointed to as the identifiable event on which the claim is grounded and from which the contractor's delay in presenting the claim can be measured, particularly where, as here, the evidence of record indicates that the Government's actions contributed to and may even have been the principal cause of the delay in giving notice of the claim.[77]

[75] Earlier the finding had noted that the public law cited therein authorized 4.3 million for emergency storm damage repairs at Cape Hatteras. It then stated: "The Government is obligated by the Public Law to provide the maximum possible protection within the emergency funds allotted."

Nowhere in these proceedings has the Government interposed a lack of funds as a defense to the claims asserted.

[76] See *Electrical Enterprises, Inc.*, IBCA-971-8-72 (March 19, 1974), 81 I.D. 114, 74-1 BCA par. 10,528, in which in the course of denying a claim cognizable under the Suspension of Work clause, the Board had occasion to distinguish the case of *Hoel-Steffen Construction Co.* v. *United States*, 197 Ct. Cl. 561 (1972), after which in footnote 13 it stated: "We note that the provision barring the recovery of costs incurred more than 20 days prior to giving the required notice has been strictly enforced prior as well as subsequent to the decision in Hoel-Steffen. See *Merando, Inc.* GSBCA No. 3300 (May 27, 1971), 71-1 BCA par. 8892; *Fred McGilvray, Inc.*, ASBCA Nos. 15741, 15778 (September 23, 1971), 71-2 BCA par. 9113; *Edgar M. Williams, General Contractor*, ASBCA Nos. 16058 et al. (October 16, 1972), 72-2 BCA par. 9734; *Desonia Construction Company, Inc.* (note 10, *supra*) and *Cameo Bronze, Inc.*, GSBCA Nos. 3646, 3656 (June 27, 1973), 73-2 BCA par. 10,135."

[77] In so concluding we have not been influenced favorably by the argument that a contractor need not protest if he thinks that it would be unavailing (note 63, *supra*). There are many cases where that argument and other

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Acceptance of Change Order No. 2.—In denying the claim the contracting officer found that at the time of acceptance of Change Order No. 2 the contractor's field superintendent was well aware of existing conditions; that the contractor's president was aware of the February storm; that the change order called for the 250,000 cubic yards of beach fill to be placed within the work limits specified by the contract drawings; and that all the material was so placed (text accompanying note 25, *supra*).

Commenting upon the basis for the contracting officer's decision, appellant's counsel states: "* * * the Contracting Officer suggested, at least by inference, that the acceptance of Change Order No. 2 by Appellant waived any right to claim an equitable adjustment for misplacement of the fill. Change Order No. 2 makes no mention of any change in the location of the fill; it merely orders an additional 250,000 cubic yards of fill at the contract price which was the government's right under the terms of the contract. It appears that the Contracting Officer may have misinterpreted Appellant's notice of claim to request an increase in the contract price *per se* whereas, in fact, Appellant merely suggested an adjustment of the contract price in the sum of $300,000 as a compromise solution to the problem of increased costs arising from misplacement of the fill. Appellant made claim for an equitable adjustment; it made no claim for additional compensation relating to Change Order No. 2." (Appellant's Posthearing Brief, 15, 16).

In its posthearing brief the Government does not even refer to the appellant's acceptance of Change Order No. 2 as a bar to consideration of the claim on the merits. In view of this and the fact that the contracting officer's findings with respect to the point under discussion resulted from an apparent misunderstanding as to the basis for the claim asserted, it is at least doubtful that the Government is presently contending that consideration of the claim on the merits is barred by reason of the contractor's acceptance of Change Order No. 2. Since the question has been raised, however, it would appear to merit some discussion.

[2] Throughout the proceeding the Government has placed great emphasis upon the fact that all or at least most of the 250,000 cubic yards of additional fill covered by Change Order No. 2 was required for the northern end of the project and that the contractor either knew or should have known this to be so (notes 10, 16 and 33, *supra*). If this was as ap-

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arguments having no foundation in the notice provisions (*e.g.*, preservation of good relationships with Government personnel until the project is completed) have been rejected. See, for example, *John H. Moon & Sons*, note 73, *supra*; *The Jordan Company*, ASBCA No. 10874 (December 15, 1966), 66-2 BCA par. 6030, at 27,869 ("Where instructions given or requirements imposed orally by the Government representative are an expression of that representative's concept of the requirements of the contract, the contractor must protest these instructions, if he expects to claim successfully that these oral instructions and/or impositions amount to a constructive change order * * *.")

parent to everyone as the Government indicates, however, an obvious question arises as to why Change Order No. 2 did not reflect this common understanding instead of stating "* * * 1. Place an additional 250,000 cu. yds. of hydraulic beach fill (beach nourishment) within the work limits specified by the contract drawings * * *." (Text accompanying notes 16 and 17, *supra*.)

Moreover, we are again confronted with the question of the time when the Government informed the contractor that 500,000 cubic yards of sand had been lost in the northern end of the project in the one storm of February 10–12, 1973 (notes 10 and 16, *supra*). If the Government had seriously advanced the defense that appellant's acceptance of Change Order No. 2 precluded our consideration of the claim on the merits, it appears that there would have been some need for it to show that the contractor was aware of the extent of sand losses on the northern end of the project prior to the time it executed Change Order No. 2 dated May 18, 1973.

The evidence of record shows that the claim in question had neither arisen nor been discussed prior to the time Change Order No. 2 was executed. We therefore find that the contractor's acceptance of the Change Order is not a bar [78] to our consideration of the claim on the merits.

Parol evidence rule.—The question of whether the Board should consider the report of a conversation which took place at the prebidding conference (note 5, *supra*) has previously been discussed (note 30, *supra*). There is no doubt that the evidence contained in the report should be considered in resolving the issues in dispute unless to do so would involve "varying the written terms of the contract or repudiating an express clause that the written contract embodies the entire agreement of the parties." [79]

In the findings the contracting officer states: "* * * at a pre-bid on-site inspection, the contractor was told that the major operation would be in the northern half of the project limits, as evidenced by question and answer No. 12 in a memorandum dated October 12, 1972 * * *" (text accompanying note 25, *supra*). At the hearing the con-

[78] See *Corbetta Construction Co., Inc.* v. *United States*, 187 Ct. Cl. 409, 428 (1969); *John A. Volpe Construction Co., Inc.*, GSBCA No. 2570 (January 5, 1970), 70–1 BCA par. 8070, at 37,538 ("* * * Elements necessary to effect an accord and satisfaction are not present. * * * An accord and satisfaction does not operate as a bar in regard to matters not contemplated by an agreement * * *. There was no bona fide dispute between the parties with respect to the Government's demand * * *. The dispute did not arise until some weeks following the acceptance of Change Order No. 26. Moreover, there was no meeting of minds at the time of the issuance and acceptance of the change order with respect to the subject of the dispute in this appeal, a necessary element to an accord. Certainly, the change order did not constitute a compromise. * * *"). *Cf. E. E. Steinlicht*, IBCA–834–4–70 (March 12, 1971), 71–1 BCA par. 8767.

[79] See order of Court of Claims in *John Billmeyer, Trustee in Bankruptcy of the Estate of Inter-Helo, Inc.* (Ct. Cl. No. 54–74, May 30, 1975), reversing *Appeal of Inter-Helo, Inc.*, IBCA 713–5–68 (December 30, 1969), 69–2 BCA par. 8034, on reconsideration (April 24, 1970), 70–1 BCA par. 8264.

tracting officer continued to ascribe considerable importance to the reported discussion between representatives of the parties at the prebidding conference (note 39, *supra*).

A showing that the contractor should have been aware that "the major [80] operation would be in the northern half of the project limits" is not in any way dependent, however, upon the answer given by the Government to the question posed by the contractor at the prebidding conference. Based upon the application of elementary arithmetical principles to the information shown on the contract drawings, it is apparent that approximately 56.40 percent of the full berm depicted thereon is to be constructed in the northern half of the project (note 61, *supra*). The appellant has acknowledged that the contract called for north to south placement of the fill (note 37, *supra*), and that "wave action in the surf zone would affect the project to some extent" (note 51, *supra*). The language in the Government's memorandum that "* * * a great deal is contingent on the method of operation and quantities pumped by the Contractor" is explained in part by the fact that at the time of the prebidding conference, it was not known whether the contract to be awarded would cover 750,000 or 850,000 or 1,000,000 cubic yards of beach fill (note 46, *supra*, and accompanying text). The manner in which the contractor's "method of operation" would affect the placement of the fill is nowhere indicated in the memorandum. Standing alone the term is too cryptic in nature to have provided a contractor with any guidance in the preparation of its bid or to even suggest a variance from the terms and conditions of the contract.

[3] We therefore find that the answer given to a question raised at the prebidding conference as reported in the Government memorandum of October 12, 1972 (note 5, *supra*), simply reflects information contained in the invitation for bids on which the contract was based. Since the report of the prebid conversation does not contravene the parol evidence rule, it will be considered by the Board in reaching its decision.

Effect to be given typical cross-section shown on contract drawings.—In resolving the dispute between the parties respecting the proper construction to be placed upon the applicable contract provisions and particularly the weight to be accorded to the typical cross-section shown on the contract drawings, we shall apply certain fundamental rules governing contract interpretation. These have been well stated in *Morrison-Knudsen Company, Inc.* v. *United States*, 184 Ct. Cl. 661, 687 (1968), from which the following is quoted:

> * * * We begin with the established principles (1) that an interpretation which gives a reasonable meaning to all parts of a contract will be preferred to

[80] The term "major" when used as an adjective has been defined to mean "greater, as in size, amount, extent, or rank." (The Random House College Dictionary, 1973 edition)

one which leaves a portion of it inoperative or superfluous; and (ii) that contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible. Hol-Gar Mfg. Corp. v. United States, 169 Ct. Cl. 384, 395–396, 351 F. 2d 972, 979 (1965), and cases cited. These principles have particular force "when the provision sought to be eliminated, or subordinated, is a standard mandatory clause of broad application, like the [article 3 Changes provision]. * * * Such a standard article, incorporated in the agreement, cannot lightly be read out of it, or deprived of most of its normal substance." Thompson Ramo Wooldridge Inc. v. United States, 175 Ct. Cl. 527, 536, 361 F. 2d 222, 228 (1966).

In this case the appellant has stated that its case for an equitable adjustment relating to the placement of the fill rests primarily upon the contract drawings (note 28, *supra*). When these drawings are examined, we find that the most prominent feature is a typical cross-section which shows that a flat 100-foot berm is to be constructed from Station 2174+80 southward to Station 2247+50, a distance of 7,270 feet. A note on the contract drawing (text accompanying note 48, *supra*) says that the western edge of the flat berm is the elevation 10.5 contour throughout the total length of the project and that the flat berm is to be 100 feet wide except for the 1,000-foot long transitions at each end of the project where the width of the flat berm will decrease uniformly from 100 feet to zero. The drawings also show a 930-foot groin area where the fill is to be placed "AS DIRECTED" (note 27, *supra*). It is the appellant's position that its single unit price bid had been predicated upon placing the beach fill as shown on the drawings and that when so much of the fill was placed on the northern end of the job its costs were substantially increased over those on which its bid had been based (notes 65 to 68, *supra* and accompanying text).

The Government acknowledges that but for the devastating storms of February and March of 1973, the beach fill would have been placed as shown on the contract drawings (text accompanying note 49 and 50, *supra*). It denies, however, that any change occurred as a result of the manner in which the fill was placed on the following principal[81]

[81] In the findings the contracting officer cites the requirement that the contractor furnish "as-constructed drawings" in support of the decision rendered. The contract provision in question (note 23, *supra*) is regarded as entirely compatible, however, with the appellant's position that performance of the contract would involve some variation from what was shown on the contract drawings within "the rule of reason" (note 33, *supra*). In the Posthearing Reply Brief appellant's counsel states at page 5: "* * * Obviously, distribution of fill over the entire project does not mean the same amount of sand at every given point. The contract calls for spreading the fill over the entire project notwithstanding the fact that there will be more fill in one place than another."

The argument advanced by Government counsel with respect to the special provision concerning control of the net in-place yardage of fill material makes no reference to the contracting officer's testimony in which he appears to have concurred in a contrary interpretation advanced by appellant's counsel except for adding the qualification that consideration would have to be given to the conditions resulting from the "great losses of sand in the northern end" and the "loss of the (barrier dune)." (Text accompanying notes 69 and 70, *supra*.) In any event the arguments advanced by both counsel with respect to the cited provision appear to be of a "makeweight" character and not in any way central to their respective positions.

grounds: (i) the contractor knew or should have known through an adequate site investigation that the unstable area of the beach was on the northern end of the project and bid accordingly, (ii) one of the special provisions vested the Government with authority to direct the placement of the fill as had been done in this case, (iii) one of the notes on the drawings implied that subsequent shoreline changes would affect the beach nourishment project, (iv) the notation on the drawing reading "FILL TO BE ACCOMPLISHED BY NATURAL WAVE ENERGY PROCESS" was sufficient notice to the contractor that the Government might rely upon the "dynamics of the ocean" or similar concept for accomplishing distribution of the beach fill, and (v) it was the Government's prerogative to increase the contract quantity by 25 percent at the original contract unit price and the contractor had been paid that price for all the fill placed in performing the contract.

Adequacy of the site investigation.—After referring to the opportunity afforded all bidders to visit the site, the project supervisor states: "It was quite apparent that the more unstable beach, the more dynamic beach, the one receiving continued erosion, was on the Northern limits" (note 43, *supra*). The contracting officer indicated that a bidder should not proceed simply on the basis of the information contained in the invitation for bids without regard to knowledge of conditions gained through a visit to the site (text accompanying note 39, *supra*). Mr. MacDonald testified that at the time of bidding there was less beach visible in the northern section (note 55, *supra*). The site visit to which the Government witnesses refer occurred on October 11, 1972. The dune line shown on the drawings (described by the project supervisor as the "batter board, the heel * * * for the placement of fill at the elevation 10.5") was washed away or pushed across the highway by the devastating storms of February and March of 1973 (text accompanying notes 49 and 50, *supra*). We find that the site investigation conducted by the contractor was adequate and that he was not chargeable with knowledge of conditions created by storms which took place several months after the scheduled site visit concluded.

Nature and extent of the Government's authority to direct the placement of the fill.—From the findings it appears that the contracting officer considered that the Special Provision entitled "SP–1 DESCRIPTION OF WORK" (note 21, *supra*) vested him with authority to direct the placement of fill as has been done in this case. In fact the provision (i) authorizes the contractor to remove borrow and distribute it as fill "as shown on the contract drawings and as directed as beach nourishment," (ii) says that "[a]pproximate limits of work, elevations and slopes of fill are indicated on the contract drawings," and (iii) authorizes the contracting

officer to "adjust or revise these limits to suit conditions during the work to provide for maximum use of material available with funds allotted."

[4] Apparently overlooked or ignored by the contracting officer and the project supervisor in administering the contract was the fact that their authority to adjust or revise the limits of the work from that shown in the drawings was circumscribed by the use of the word "approximate" (note 32, *supra*). Accordingly, we find that SP–1 vested the contracting officer with no plenary [82] authority to direct the placement of the beach fill.

Implied knowledge of subsequent shore line changes.—In the findings the contracting officer quotes the following from Note 1 on the contract drawings: "THE SHORELINE OF HATTERAS ISLAND HAS CHANGED SINCE THE PHOTOGRAPHIC BASE MAP WAS MADE * * * THE SHORELINE CHANGES TO DATE WILL NOT AFFECT THE BEACH NOURISHMENT PROJECT SHOWN HEREON." Then he states: "Implicit in the foregoing is the idea that subsequent shoreline changes would affect the beach nourishment project.* * *" (Text accompanying notes 24 and 25, *supra*.) The "photographic base map" [83] to which the note on the drawings refers was made in 1967 or some 5 years before the invitation for bids involved here was issued (note 24, *supra*). It appears that the purpose of the note was to assure bidders that any shoreline changes from those shown on the "photographic base map" were not sufficient to affect bidding on the beach nourishment project despite the intervening years.

The work covered by the instant contract was scheduled for completion within 180 calendar days after receipt of the notice to proceed. This being so we are unable to perceive why a prospective bidder should conclude that shoreline changes over a 6-month period "would affect the beach nourishment project" when it had the Government's as-

[82] While the provision (note 21, *supra*) contemplates that the contracting officer and his representative will have some leeway in the direction of the work, it is clear that the discretion vested in them must be exercised reasonably. See *Fox Valley Engineering, Inc.* v. *United States*, 151 Ct. Cl. 228, 236 (1960); *Padbloc Company, Inc.* v. *United States* (1963), 161 Ct. Cl. 369, 376 ("* * * defendant * * * could not expect the plaintiff to make an offer or adhere to an arrangement which gave the United States carte blanche * * *.")

We note that the notation on the contract drawing (note 27, *supra*), "FILL CELLS OF GROIN SYSTEM AS DIRECTED," is not accompanied by any qualifying language. While the broad authority so conferred would no doubt have to be exercised reasonably, there would appear to be nothing to preclude the contracting officer from taking into account the conditions present at the site when the time arrived for exercising his discretion.

[83] We have interpreted the term to refer to the underlying photograph and not what was drawn on the photograph at a considerable later period based upon a field survey. Commenting upon the dual aspect of the contract drawings, appellant's counsel states: "39. The picture on which the project is drawn in the contract drawings was taken in 1967 and the fill as drawn provides for a uniform curve of fill 100 feet wide to serve as short-term protection for the Buxton area (Tr. 153)." (Post-hearing Brief, 9, 10.)

surance that the shoreline changes that had occurred over the preceding 5 years had not. It is true, of course, that shoreline changes materially affecting the beach nourishment project did occur during the life of the contract. The test to be applied, however, is surely not what everyone knew after the fact but what they could reasonably be expected to know before the fact. Applying the latter test to this case, we find no warrant for the contracting officer's bald assertion that the note on the contract drawings implied that "subsequent shoreline changes *would* affect the beach nourishment project." (Italics supplied.)

Reliance upon the "dynamics of the ocean" for the distribution of the fill.—The beach nourishment project with which we are here concerned appears to have been completed with the addition of but 250,000 cubic yards of sand to the original contract quantity because and only because the Government relied successfully upon a "dynamics of the ocean" concept to accomplish distribution of a substantial quantity of the beach fill. Considering the vast quantities of sand lost in the February and March [84] storms of 1973, the successful completion of the project in such circumstances appears to reflect the exercise of a high degree of ingenuity. We are not concerned to assess the engineering feat [85] involved in the endeavor, however, but rather to determine whether the project as built differed materially from the project bid upon.

Although the propriety of resorting to the "dynamics of the ocean" concept for distribution of the fill is central to the establishment of the Government's case, there is only one provision [86] in the contract as let to bid and one provision in Change Order No. 1 which furnish any semblance of support for the Government's position.

The Government relies primarily [87] upon a note on the contract

[84] If the amount of sand lost in the March storm represented only one-quarter of the 500,000 cubic yards lost in the February storm (see note 10 and accompanying text) the sand losses attributable to the two storms would total 625,000 cubic yards (*i.e.*, exactly 50 percent of the 1,250,000 cubic yards of sand called for by the contract, as amended by Change Order No. 2).

[85] From a technical standpoint the appellant does not contest the judgment the Government exercised in directing the placement of the fill. This view of the matter is clearly set forth at page 17 of appellant's Posthearing Brief ("* * * It may be that the beach was constructed in the best way under all the circumstances, but Appellant is entitled to an equitable adjustment for the gross and costly departure from the contract as let to bid. Testimony of Mr. Riddel makes clear that after the storm of February 10–12, 1973, he was not sure how far the fill available would go and how he was going to use it to build a beach to protect the property at Cape Hatteras. Appellant was at all times under this construction of the contract at the hazard of circumstances as they developed from day to day and from storm to storm. * * *").

[86] The fact that the contract clearly calls for the fill to be placed from a generally north to south direction (note 70, *supra*), appears to have no direct bearing on the question. While the project supervisor cited the north to south placement requirement as if it supported the Government's position (note 37, *supra*), he failed to indicate the basis for his conclusion. In any event, notice to the contractor of the one (north to south placement) is clearly not notice to the contractor of the other (reliance upon the dynamics of the ocean for distribution of the fill).

[87] See notes 35 to 39, *supra*, and accompanying text.

drawing which reads: "FILL TO BE ACCOMPLISHED BY NATURAL WAVE ENERGY PROCESS." Mr. MacDonald construed the note to mean that the contractor would pump the flat part but the part that sloped into and perhaps under the ocean at "say 30 to one" the contractor should make no effort to make it look like a straight line but rather "let the ocean take its natural repose." (Note 36, *supra.*) The language used may well be susceptible to other constructions but the interpretation placed upon the provision by Mr. MacDonald is considered to be reasonable.[38] On the other hand the interpretation contended for by the Government would render "inoperative or superfluous" the requirements of the contract calling for (i) the construction of a 100 foot flat berm from Station 2174+80 to Station 2247+50 (text preceding note 81, *supra*) (ii) the placement of fill in the groin area "AS DIRECTED" (note 27, *supra*) (iii) the creation of "1,000′ LONG TRANSITIONS AT EACH END OF THE PROJECT WHERE THE WIDTH OF THE FLAT BERM WILL DECREASE UNIFORMLY FROM 100′ TO ZERO" (text accompanying note 48, *supra*), and (iv) the "shaping by mechanical equipment * * * required to construct the fill sections within allowable tolerances as shown on drawings." (Note 70, *supra.*)

It also appears that some support for the Government's position may be found in the second paragraph of Change Order No. 1 which reads as follows:

> 2. Because of changes in the beach profile and the loss of protective dune structures, you are to begin pumping operations at Station 2228+00 and continue in a northerly direction to the point of beginning designated on the contract drawings. The nourishment cross-sectional plan incorporated in your contract is to be followed where practical, but adjustments must be made consistent with the position of the inner and outer bars and other oceanic conditions.

Before accepting the contracting officer's view of the significance of the quoted paragraph, we would want to know whether prior to the acceptance of the change order the contractor was told (i) that 500,000 cubic yards of sand had been lost in the February 10–12, 1973, storm, and (ii) that the Government considered that "a major change in conditions resulting from a storm on February 10–12, 1973, [would necessitate an] alternation of the basic design cross-section * * *" (notes 57 and 58, *supra* and accompanying text). Even if it were to be established that the answers to both of the questions posed above were in the affirmative, however, there would still be insufficient warrant for concluding that the change order authorizes the Government to rely upon the dynamics of the ocean for the distribution of the fill. This

[38] See *Whalen & Company*, IBCA–1034–5–74 (July 18, 1975), 82 I.D. 335, 75–2 BCA par. 11,377, in which the Board states "* * * the issue, once an ambiguity is found, is not whether appellant's interpretation is correct but whether it is reasonable * * *."

is because to interpret the language employed in the change order as authorizing such a procedure would also have the effect of rendering "inoperative and superfluous" the contract requirements referred to above. In this connection we note that the change order expressly provides: "Except as provided herein, all terms and conditions of this contract remain unchanged and in full force and effect" (note 12, *supra*).

[5] We therefore find that the contract drawings and particularly the typical cross-section shown thereon constituted material representations for the guidance of bidders as to whether the beach fill would be placed and that in consequence the Government was not authorized to resort to the dynamics of the ocean concept as a primary means for distributing the fill without providing for an equitable adjustment in the total contract price to the extent the contractor's costs were increased thereby *Morrison-Knudsen Company, Inc.*, *supra*, at 685–687.

Relationship between Changes clause and estimated quantity provisions.—In the findings the contracting officer quoted a portion of Paragraph SP–8 of the Special Provisions (note 15, *supra*), after which he stated at page 3: "The changes ordered by the Contracting Officer did not result in an increase of more than 25 percent of the original total contract amount, and an adjustment in the contract unit price is therefore not in order * * *." [89] We have previously found that the contractor's acceptance of Change Order No. 2 covering that 25 percent increase over the original total contract amount (text preceding note 78, *supra*) "is not a bar to our consideration of the claim on the merits."

In *Morrison-Knudsen Company, Inc.*, IBCA–36 and IBCA–50 (May 27, 1957), 64 I.D. 185, 57–1 BCA par. 1264, one of the principal questions presented concerned a claim under the changes clause for the curtailment in borrow production attributed to pit changes which resulted in much longer hauls than shown on the contract drawings. The Board stated the crux of the case to be "whether relief can be afforded to the contractor under the 'changes' and 'changed conditions' articles of the contract, notwithstanding the special provisions of the standard specifications, which modify the contract articles, and limit the extent to which they may be applied. * * *" (64 I.D. 195, 57–1 BCA par. at 3827.)

The Board found "changes * * * due to unanticipated field conditions," and that the contractor was therefore, "entitled to additional compensation only by reason of overruns or underruns in excess of

[89] Commenting upon this position Government counsel states: "* * * the Contracting Officer did not invoke special provisions 1(A), 8, and 13(A) to permit deviation in beach width from that shown on the drawings, as implied by appellant. These provisions were invoked to counter the contractor's apparent contention (two letters of August 15, 1973) that the fact that 'the great majority of the fill has been deposited at the northern end of the project' * * * constitute a constructive change * * *." (Government's Answer, 4.)

25 percent of the estimated bid quantities. * * *" (64 I.D. 198, 57–1 BCA par. at 3830.) [90]

In the course of reversing the Board's decision with respect to the borrow claim, the Court of Claims in *Morrison-Knudsen Company, Inc.* v. *United States*, *supra*, construed the provisions of the specifications so as not to restrict the application of the changes clause to the relatively narrow area delineated in the Board's decision. With respect to the borrow claim, the Court stated:

> There can be no doubt, at the outset, that the contract drawings constituted material representations for the guidance of the bidders as to the location of the borrow pits and the quantity of borrow material [91] that was to be obtained from each. (Indeed, without such drawings it is difficult to see how any bid could have been made.) Moreover, plaintiff relied on the relative accuracy of the borrow pit locations and the other data set out in the drawings and was reasonably justified in doing so. * * * The short of the matter is that the information contained in the drawings constituted positive representations upon which plaintiff was justified in relying. * * *
>
> This brings us to the question of whether an equitable adjustment for such changes—which the board found were due to field conditions not forseen [92] by the parties—is precluded by the specifications (particularly article 4.3) unless there were an overrun or underrun in excess of 25 percent of estimated bid quantities. * * *
>
> * * * * * *

[90] The decision was affirmed on reconsideration (March 23, 1959), 66 I.D. 71, 72, 59–1 BCA par. 2110 at 9030 ("Briefly, the Board held in its decision that under the terms of the specifications, which included provisions, modifying the 'changes' and 'changed conditions' articles of the contract, so as to reserve a right to the Government to make changes in the plans to meet unanticipated field conditions, and to limit the right of the contractor to additional compensation to instances in which there were overruns or underruns in excess of 25 percent of estimated quantities, the appellant was not entitled to additional compensation by reason of deficiencies or changes in the borrow pits, except to the extent that borrow and overhaul exceeded the stated limitation. * * *" (Footnote omitted.)).

[91] As to the borrow the Court states (184 Ct. Cl. 683, n. 17): "The estimated quantity of borrow under the contract was 742,000 cubic yards and the board found that plaintiff and its subcontractor removed 783,637 yards for an overrun of less than six percent."

[92] A succinct summary of the holding in *Morrison-Knudsen* is contained in our decision in *James Hamilton Construction Company and Hamilton's Equipment Rentals, Inc.*, IBCA–493–5–65 (July 18, 1968), 75 I.D. 207, 241–42, 68–2 BCA par. 7127 at 33,050 in which the Board commented:

"In giving effect to the provisions of Article 4.2 and the related clauses of the contract, we find no conflict with the position taken from time to time by the Court of Claims and most recently in Morrison-Knudsen Company, Inc. v. United States (Ct. Cl. No. 239–61, June 14, 1968). That position is that a clause such as Article 4.2 diminishes the scope of the Changes clause. In dealing with a provision such as Article 4.2 the Court 'will construe the agreement, to the extent it is fairly possible to do so, so as not to eliminate the standard article [the Changes clause] or deprive it of most of its ordinary coverage.' * * * The Court thereupon held that a contractor who sustained an overrun of less than 25 percent of an estimated bid quantity was nevertheless entitled under the Changes clause to an equitable adjustment, despite the presence of a provision in the nature of Article 4.2, because such provisions are not 'the *exclusive means* for obtaining a changes adjustment.' * * * That is to say, according to the Court, even with the limitation imposed by a provision such as Article 4.2, when a 'contractor is required, because of unforeseen field conditions, to do, within the prescribed percentage limits, a greater or lesser quantity of work than could be originally estimated * * * a change in such circumstances is compensable under the Changes clause if the extra costs so incurred differ materially from the costs reimbursed through unit-price payments.' * * * The Court allowed 'a modification * * * separate and apart from a modification of the unit price—for the costs of extra work greatly differing from those compensable through unit-price payments.'"

In this context, a reasonable interpretation of article 4.3 * * * —when considered in conjunction with the article 3 Changes clause of the contract—is (1) that the purpose of these specifications is to provide a ready means for avoiding controversy when, during the course of performance, the contractor is required, because of unforeseen field conditions, to do, within the prescribed percentage limits, a greater or lesser quantity of work than could be originally estimated; and (2) that a change in such circumstances is compensable under the Changes clause if the extra costs so incurred differ materially from the costs reimbursed through unit-price payments. This interpretation is fortified by the language of the specifications themselves. Article 4.3 (a) [93] is the key provision.

* * * this is not to say that there cannot be a modification otherwise—separate and apart from a modification of the unit price—for the costs of extra work greatly differing from those compensable through unit-price payments. * * * Furthermore, article 4.3(a) contains no indication that it is to override the Changes clause or that the provisions of article 4.3(c), 9.3(b), or 9.4(c) of the specifications are to be the *exclusive means* for obtaining a changes adjustment. (Footnote omitted.)

* * * * *

It is concluded, in short, that the equitable adjustment for the changes required by the government is not limited by the specifications to overruns or underruns in excess of 25 percent of estimated bid quantities. Instead, plaintiff is entitled to an equitable adjustment under the Changes clause (on its own behalf and on behalf of its subcontractor) for all the increased costs [94] resulting from the changes in question * * *. (184 Ct. Cl. 685–690.)

[6] Turning to the case at hand we note that SP–8, the special provision of the contract relied upon by the contracting officer as a defense to the claim asserted (at least with respect to the 250,000 cubic yards of beach fill added to the contract by Change Order No. 2) provides in especially pertinent part (note 15, *supra*): "* * * If the change (or changes) does not result in an increase or decrease of more than 25% of the original total contract amount, no adjustment in the contract unit prices will be made * * *." Clause 60 of the General Provisions entitled "Variations In Estimated Quantities" provides in pertinent part: "Where the quantity of a pay item in this contract is an estimated quantity and where the actual quantity of such pay item varies more than twenty-five (25%) percent above or below the estimated quantity stated in this contract, as it may hereafter be modified, an equitable adjustment in the contract unit price shall be made upon demand of either party. * * *"

[93] "Art. 4.3 *Changes and Increased or Decreased Quantities of Work.*—(a) It is mutually agreed that due to latent and/or unforeseen conditions, adjustments of plans to field conditions which cannot be foreseen at the time of advertising, will be necessary during construction, and it is therefore of the essence of the contract, to recognize such changes in plans as constituting a normal and expected margin of adjustment, not unusual and not differing materially in the meaning of article 4.2(a) and not involving nor permitting change or modification of contract prices, provided only that resulting overruns or underruns from the quantities in the bid schedule do not exceed reasonable percentages."

* * * * *

[94] Earlier in the opinion the Court had noted "the substantial extent to which daily borrow production (and corresponding revenue) would be reduced when borrow-haul distances were increased." (184 Ct. Cl. 675; see also detailed calculations set forth on the same page in footnote 10.)

The language quoted above from the two contract clauses cited makes clear that the limitation on adjustment or equitable adjustment within the specified range of 25 percent applies only to the contract unit prices. In this connection we note that in *Morrison-Knudsen*, *supra*, the article the Court identified as the key provision referred to "contract prices" concerning which the Court stated: "The 'contract prices' thus referred to are, obviously, the unit prices set out in the bid schedule * * *." Here we have no similar problem of interpretation [95] for SP-8 and Clause 60 use the terms "contract unit prices" or "contract unit price" in speaking of "adjustment" or "equitable adjustment" in connection with the 25 percent limitation. There is nothing in the two provisions to which we have referred to indicate that either of them was intended (i) to override the Changes clause, (ii) to be the *exclusive means* for obtaining a changes adjustment, or (iii) to prohibit a modification of the contract—separate and apart from a modification of the unit price—for the costs of extra work greatly differing from those compensable through unit-price payments.

The distinction made by the Court in *Morrison-Knudsen*, *supra*, between costs compensable through unit-price payments [96] and those for which reimbursement is to be provided under the Changes clause is at least suggested by the following statements in Appellant's posthearing brief: "* * * It appears that the Contracting Officer may have misinterpreted Appellant's notice of claim to request an increase in the contract price *per se* * * * Appellant made claim for an equitable adjustment * * *." (Text preceding note 78, *supra*.)

Based upon the authorities cited and the evidence of record, the Board finds as follows:

1. The contract drawings including the typical cross-section shown thereon were positive representations by the Government upon which the contractor was entitled to rely and did rely in the preparation of its bid for the hydraulic beach fill (beach nourishment).

2. The contractor submitted a single unit-price bid for the specified beach fill which was to be obtained from a Government desig-

[95] Also absent from the instant contract is the array of exculpatory provisions confronting the Court in *Morrison-Knudsen*.

[96] Even before decision of the Court of Claims in *Morrison-Knudsen*, the Board had recognized that there were a number of situations where the work required was not covered by the contract unit prices. See *Barringer and Botke*, IBCA–428–3–64 (March 23, 1966), 66–1 BCA par. 5458. See also *Kinemax Corporation*, IBCA–444–5–64 (January 19, 1967), 74 I.D. 28, 67–1 BCA par. 6085 and cases cited in footnotes 13 and 14. *Cf. James Hamilton Construction Company, et al.*, note 92, *supra*, where the following statement appears (75 I.D. 242, 68–2 BCA at 33,050): "In our view the result reached in Morrison-Knudsen is not appropriate here. The emphasis in Morrison-Knudsen is upon foreseeability. The Court * * * underscored the following quotation from a previous decision: 'But we have held that clauses of this type do not control when the cost of doing the extra work greatly differs from the stated unit-price because of factors not foreseen by either party.' There is no factor of unforeseeability present in this case * * *." (Footnote omitted.)

nated borrow pit and distributed over the beach area involved.

3. Because of the single-unit price basis on which bids had been solicited, the contractor averaged its costs for distributing the fill over the entire 10,200 feet of the project taking into account the following factors:

a. the designated pit from which the borrow was to be obtained was located over a mile south of the southern end of the project;

b. production goes down and costs go up generally in proportion to the distance the beach fill has to be pumped; and

c. wear and tear on pumps greatly increases for sand pumped to the northern end of the project since greater pressure must be used and applied for longer periods than would be the case if the same amount of fill were to be placed in the southern end of the project or in other areas closer to the desiginated borrow pit.

4. Prior to the devastation wrought by the February and March of 1973 storms, the Government had contemplated [97] that the beach fill covered by the contract would be distributed as indicated by the typical cross-section shown on the contract drawings.

5. In coping with the conditions created by the February and March of 1973 storms, the Government was required to abandon adherence to the typical cross-section in a substantial area of the project (from Station 2228+00 northward to the beginning of the project) or chose to do so (in the area from Station 2228+00 southward to the end of the project).

6. The inability or the failure of the Government to adhere to the typical cross-section shown on the contract drawings resulted from conditions which were unforeseeable to both parties at the time the invitation for bids was issued and the resulting contract awarded.

7. The manner in which the Government directed the placement of the fill increased the contractor's cost over those compensable through unit-price payments.

8. As the incurrence of the costs involved were unforeseeable, the contractor is entitled to an equitable adjustment under the Changes

[97] There is language in Government Exhibit A (text accompanying notes 41–43, *supra*, indicating that the February and March 1973 storms did not significantly affect the Government's plans for the distribution of the fill. Since the exhibit is dated February 1974 (*i.e.*, after the contract was completed), it may involve more hindsight than foresight. In any event we have regarded statements of this nature as reflecting some hyperbole upon the part of the authors. If the statements from Government Exhibit A were to be accepted at their face value, however, then it would be true that the Government would have issued an invitation for bid calling for the contractor to construct a 100-foot berm covering 7,270 feet of a 10,200-foot project (over 70 percent), while planning for "mother nature" to distribute a substantial portion of the fill through having the contractor place all or most of it on the northern end (the area most costly to the contractor and most destructive of its equipment) without disclosing its intentions to the bidders concerned until after they had submitted the single unit-price bid required by the invitation.

Assuming, *arguendo*, that such circumstances were shown to be present in this case, it appears to be clear that the contractor would be entitled to a summary finding in his favor by the Board or in another forum depending upon whether or not a claim so framed was determined to be cognizable under the contract.

clause [98] for the increased costs resulting from placement of the beach fill as directed by the Government without regard to the 25 percent limitation provisions to the extent the contractor shows (i) the basis upon which its bid was calculated and (ii) the causal connection between the increased costs claimed and the departure from the typical cross-section shown on the contract drawings with respect to placement of the fill.

The claim for the misplacement of the fill is granted as to liability and, pursuant to the stipulation of the parties, is remanded to the contracting officer for determination of the equitable adjustment to which the contractor is entitled in accordance with this opinion. In the event the parties are unable to agree upon the amount of the equitable adjustment, it is contemplated that the contracting officer will issue a findings of fact from which the contractor may again appeal to this Board.

Claim for Costs Attributed to Stop Order—$74,000

The claim encompasses appellant's request for additional compensation in the amount of $74,000 for 14 days' cost and overhead attributed to a stop order issued by the contracting officer and in effect for the period March 7 to March 13, 1973 (Exhibits 31 and 33). In the claim letter of August 15, 1973 (Exhibit 21), appellant writes:

> While the stop order was only in effect for five (5) working days, it necessitated another nine (9) days before we could effectively resume our mobilization efforts. As a consequence, we hereby make claim for fourteen (14) days' costs and overhead, reckoned in round numbers at $6,000 per day, or a total of $74,000.[99] This figure covers costs and overhead but no profit for our mobilization work at the

[98] *Cf. Cotton Company, Inc.* v. *United States*, 87 Ct. Cl. 563 (1938), a case involving suspension of work on a river levee because of emergency conditions created by heavy and excessive rainfall in which the Government took over and completed the work when the contractor refused to proceed without a written change order. The Court stated at page 572:

"* * * The requirement by the contracting officer of the resumption of the work under changed conditions which entailed purchasing and furnishing entirely different equipment than that contemplated by the contract, a radically different method of work, and the taking of material from a more remote location, was such a material change in the terms of the contract as to entitle the contractor to a written change order under Article 3. The refusal to give a change order in writing was a breach of the contract."

Here none of the beach fill had been placed prior to the February and March 1973 storms (note 25, *supra*). Therefore, cases applying the risk of loss provisions of variations of the "Permits and Responsibility" clause do not control the present case. For an example of the many cases in which contractors have been held responsible to redo work destroyed prior to acceptance, see *DeArmas* v. *United States*, 108 Ct. Cl. 436 (1947). The *DeArmas* rule has been applied by the Board in a number of cases, including *Charles T. Parker Construction Co.*, IBCA-335 (January 29, 1964, 71 I.D. 6, 10, 1964 BCA par. 4017, at 19,792-793, in which the Board stated: "It is well settled by the courts and by opinions of this Board that where work is damaged before completion and acceptance by an Act of God or by other forces of nature, without the fault of either party, and in the absence of a contract provision shifting the risk of such a loss to the Government, the contractor is obligated to repair the damage at its own expense." (Footnotes omitted.)

[99] The $74,000 figure reflects an error either in the amount claimed or in the numbers used in the calculation since 14 days' cost at $6,000 per day equals $84,000.

time of the aforesaid suspension at the instance of the United States.

As we have previously noted, the stop order cited as its authority Clause 23(a) of the General Provisions (note 11, *supra*). The entire clause is quoted below:

23. SUSPENSION OF WORK

(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contracting Officer in the administration of this contract, or by his failure to act within the time specified in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

In denying the claim for increased costs based upon the stop order the contracting officer stated [100] that a review of the contractor's payrolls for the weeks ending March 9, 16 and 23, 1973, indicated that maximum effort continued by a full complement of personnel during the 14-day period commencing March 8, 1973.[101] The contracting officer also noted the absence of any evidence that the contractor incurred increased costs and overhead by reason of the stop order.[102]

The principal defenses to the claim are raised in the Government's Answer in which it is asserted (i) that under paragraph 23(b) of the clause, adjustment for increased performance costs is to be made only if the suspension has been "for an unreasonable period of time" and (ii) that under 23(c)(2) of the clause, no claim is to be allowed "unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension."

[100] The contracting officer also stated that the contractor's acceptance of Change Order No. 2 constituted an accord and satisfaction of any claim which it had by reason of the stop order. At the hearing the Government offered no evidence in support of this affirmative defense, however, and in its posthearing brief Government counsel states: "3. The Government defense to this claim is not based on a theory of accord and satisfaction. * * *"

[101] Appellant comments: "* * * suffice it to say for these purposes that the payroll alone is not indicative of the production of sand which is the only basis for income to the contractor * * *" (Notice of Appeal, 8, 9).

[102] Exhibit 12, Findings 6, 7.

In its posthearing brief the appellant states: "Appellant's entitlement under the circumstances here should be without regard to whether the period of the stop was reasonable or unreasonable * * *." (Appellant's Posthearing Brief, 17.) Expanding upon that position in its posthearing reply brief, appellant comments:

2. A suspension for the convenience of the Government under 23(a) should be compensable since it is not by its terms the same type of suspension provided for under 23(b).[103] An order to stop all work is really not an act of the Contracting Officer in the administration of the contract within the context of 23(b). The notice requirements under 23(c) distinguish a *Stop Order* of the Contracting Officer from an act of the Contracting Officer having the same effect. 23(b) items are delays incident to decisions by the Contracting Officer regarding going forward with the contract. Appellant contends that the stop was unreasonable under all the facts and circumstances of the case if a determination of unreasonableness is required. A stop for the convenience of the United States should be compensable under Clause 23 without regard to the question of reasonableness. (Posthearing Reply Brief, 7, 8.)

Addressing itself to the question of reasonableness in its Posthearing Brief at pages 20 and 21, Appellant states:

The cases which have ruled upon the question of the unreasonableness of a suspension of work are many and varied. By and large any suspension resulting from a failure[104] on the part of the Uni-

[103] The distinction urged by the appellant has not been recognized by the Court of Claims. See *Urban Plumbing & Heating Co.* v. *United States* (1969), 187 Ct. Cl. 15, 34 ("The liability of the Government here where no suspension of work was issued, but should have been, is the same as it would have been if it had been issued. * * *"). In *John A. Johnson and Sons, Inc.* v. *United States*, 180 Ct. Cl. 969, 986 (1967), the Court commented: "Stated in the alternative terms used by the board, the principle it sought to follow is:

" 'That the suspension of work clause— * * * is designed to permit a contracting officer to issue a suspension of work order when he finds it necessary for the convenience of the Government to interrupt or delay a contractor's work in a matter or manner not otherwise authorized in the contract * * * and, if the resulting interruption or delay is for an unreasonable length of time causing additional expense or loss to a contractor, without fault on his part, to make him whole through appropriate adjustments in time for performance and in contract price. * * *' "These are correct summary statements of the basic principles governing the application of the suspension of work clause * * *."

[104] Appellant does not identify the act or acts upon which it relies as constituting "a failure on the part of the United States" in this case. The appellant has never contended that the contract specifications, plans or drawings were defective. Its witnesses testified that they could have been substantially adhered to even after the storms of February and March of 1973. The Government's direction for the placement of the beach fill has no bearing on the question presented since no fill was placed until pumping began in April 1973 (*i.e.*, a couple of weeks after the stop order had been rescinded).

Establishment of Government fault is not a prerequisite to obtaining relief under the Suspension of Work clause. See *Merritt-Chapman & Scott Corporation* v. *United States*, 192 Ct. Cl. 848, 852 (1970) ("* * * There are occasions for the Suspension of Work clause to operate when the Government is at fault * * * but the clause can likewise be effective * * * when there is a suspension not due to the Government's fault, dereliction, or responsibility * * *. An instance of the latter category is a suspension and delay which lasts so long (regardless of the absence of government fault) that the contractor cannot reasonably be expected to bear the risk and costs of the disruption and delay. That is one type of suspension and delay 'for an unreasonable length of time causing additional expense,' within the meaning of the clause. Depending on the circumstances, a delay due to a non-fault suspension by the Government can obviously be so protracted that it would be unreasonable to expect the contractor to shoulder the added expense himself. We think that in its terms and its purpose the Suspension of Work clause covers that situation among others.").

ted States is held to be unreasonable. See *Appeal of Electrical Enterprises, Inc.*, IBCA 971–8–72 (3/19/74), dealing with a delay resulting from defective specifications. The Stop Order in the case at bar was unreasonable because:

(a) The storm which is supposed to have caused the Stop Order occurred almost one month before the order and the solution to the problem of lack of right-of-way had been suggested by Appellant in its letter of February 20, 1973,[105] i.e., pump a right-of-way from south to north;

(b) The Stop Order totally immobilized the mobilization effort of Appellant with a corresponding shutting off of all preconstruction activity with no benefit to Appellant of any kind but rather substantial damage;

(c) The stop was issued for an indefinite period and made planning by Appellant for the resumption of mobilization impossible, thus working a total disruption of Appellant's efforts on this job;

(d) The record is barren of any evidence[106] of activity by the United States looking toward a termination for the convenience of the government; the surrounding facts and circumstances, as pointed out above, make it virtually certain that there was not to be a termination for the convenience.

[105] The February 20, 1973, letter (Exhibit 35), was not written until 8 days after the storm of February 10–12, 1973, concluded. The letter includes the following statement: "It is necessary for the Park Service to obtain permission from private property owners to place sand on their property in order to reclaim Park property from the Ocean."

This portion of the contractor's proposal was not accepted by the contracting officer as is clear from paragraph 4 of Change Order No. 1 (note 12, *supra*).

[106] The appellant's posthearing reply brief points to such evidence, however, stating: "1. The Stop Order itself (Appeal File No. 33) was a 23(a) Stop Order which, by its terms, is 'for the convenience of the Government.' The order recites that 'at the time there is a strong possibility that a determination will be made to terminate the contract for the convenience of the Government.'" (Appellant's Posthearing Reply Brief, 7.)

At the hearing appellant's witness MacDonald testified that after the storm in February, he received a call from the contracting officer in which he was told a stop order telegram would be issued and to stop all productive effort on the contract because there was a strong possibility that the contract would be terminated. Following this call the appellant sent back to the yard any employees that were not necessary for the actual maintaining and watching of equipment or for taking care of the safety. Suppliers of large items of equipment were called in an effort to stop deliveries but one of these items was already in transit (Tr. 25, 26). Upon cross-examination Mr. MacDonald acknowledged that at the time the stop order was received, he wished to continue with the contract rather than have it terminated for the convenience of the Government (Tr. 50). In response to a question from the hearing member as to whether the 5-day stop order was an unreasonable length of time for the Government to investigate the condition encountered on the job, Mr. MacDonald stated:

Well, I feel that the actual stop was not necessary. We could have continued mobilizing regardless of the storm while they did their work of clearing it up. I had the feeling that there was a lot of political pressure from the Government to stop and cancel out the work. And also there was a lot of political pressure from the people down there to do it, and that this is what they were arguing. I didn't feel it was reasonable that we had to stop because I felt we could have continued mobilizing and doing the work

with the Change Order No. One which we eventually got. (Tr. 188, 189.)

After detailing the nature of the pressures to which he referred (note 44, *supra*), Mr. MacDonald admitted the possibility that in some circumstances a small savings to the Government could result from the issuance of the stop order (Tr. 191).

Earlier we had occasion to refer to the testimony of the project supervisor in which, in response to a question as to why the stop order was issued in March of 1973, he stated: "We were evaluating what we could do * * *" (note 49, *supra*). Very similar testimony was given by the contracting officer who stated:

A. Thinking back we had a rather devastating storm that occurred on February 10. Lasting * * * through perhaps February 12. This storm did, in fact, inundate federal lands. It played havoc with the contractors materials on hand. It adversely affected the transportation facilities in the area. It required us to gather information to evaluate whether or not it was possible to continue the project. * * * The very (dunes) had washed out. We could no longer proceed on federal lands unless we reversed our proposed construction direction. * * * (Tr. 95, 96.)

Upon cross-examination the contracting officer reaffirmed that the stop order of March 1973 was related to the earlier storm and flatly denied that it was related to anything else. He also rejected the suggestion that the stop order was issued at least in part so that the Government might give further consideration to not going ahead with the job. Elaborating upon this position the contracting officer stated:

* * * We were reappraising our position. There were great legal questions to be raised. We no longer had federal lands over which to traverse with our project. You might full well appreciate that we had no means to go on. We were in fact giving some thought to termination. (Tr. 110, 111.) [107]

Decision

[7] At the outset we must determine whether the appellant is correct in asserting that in the circumstances present here the appellant's entitlement should be "without regard to whether the period of the stop was reasonable or unreasonable." In developing this position appellant attempts to draw a distinction between claims under Clause 23(a) and claims under Clause 23(b). The arguments advanced by appellant in support of this position are unaccompanied by any citation to authority except for a reference to our decision in *Electrical Enterprises, Inc.* (note 76, *supra*). That case did not involve the issuance of a written stop order (the present case) but was concerned with treatment of a claim for constructive suspension. Moreover, there is no language in *Electrical Enterprises*,

[107] Immediately after this testimony the following colloquy occurred between the contracting officer and appellant's counsel:

"Q. Were you not giving consideration to termination even before the storm?

"A. Absolutely not.

"Q. Was there anyone urging that?

"A. Not to my knowledge. * * *" (Tr. 111.)

Inc. supportive of appellant's position.

In the portion of the claim letter of August 15, 1973, quoted above, appellant states: "This figure covers costs and overhead but no profit * * *." The failure to even ask for profit on the amount of costs said to be attributable to the stop order appears to be a recognition by the appellant that profit is excluded from costs recoverable for a suspension by the express terms of Clause 23(b) and that the prohibition applies even though the stop order was issued under Clause 23(a). In any event it is clear that the only provisions governing adjustment contained in Clause 23 are those set forth in paragraph (b).

Focusing attention upon paragraph (c) of the clause, appellant states: "The notice requirements under 23(c) distinguish a *Stop Order* of the Contracting Officer from an act of the Contracting Officer having the same effect." While 23(c) does provide that the 20-day notice provision is not applicable to a claim resulting from a suspension order, the apparent purpose of the parenthetical exclusion is to explicitly recognize that contractors should not be held to the same stringent notice requirement where the claim is based upon a written order of the contracting officer suspending the work in whole or in part. As to this we note that there is little prospect of claims falling in the category of "surprises" if they are based upon a written stop order.

It is clear that on appellant's view a contractor who is required to establish the fact that a constructive suspension occurred in order to bring the claim within the coverage of the Suspension of Work clause would also have to shoulder the burden of showing that the suspension, delay or interruption continued for an unreasonable period of time. Nowhere has the appellant undertaken to say why a contractor who received a written order suspending the work and who will consequently have no difficulty proving the fact of the suspension (the written stop order would ordinarily be included in the appeal file) should be relieved of the responsibility of having to show that the suspension continued in effect for an unreasonable period of time.

We find that the appellant's attempt to bifurcate Clause 23 in the manner suggested is not supported by the terms of the clause; nor is it supported by the clause's apparent purpose (notes 103 and 104, *supra*). Before turning to the question of whether in the circumstances of this case the stop order suspended the work for an unreasonable period of time, we must address what appears to be appellant's two principal arguments, namely: 1. there was no need for the issuance of the stop order, and 2. the approximately 3-week delay between the cessation of the February 10–12, 1973, storm and the issuance of the stop order (March 6, 1973) raises a serious question as to whether the stop

order was related solely or even mainly to the storm damage.

From the portion of Mr. MacDonald's testimony quoted above, it is apparent that appellant's basic position is that there was no need for the stop order or, in the words of the witness, "the actual stop was not necessary." This position appears to overlook the fact that Clause 23(a) clearly vests the contracting officer with the authority to suspend the work for the convenience of the Government and that the exercise of that authority necessarily entails a considerable amount of discretion.

If as Mr. MacDonald says "there was a lot of political pressure from the Government to stop and cancel out the work," the project personnel may have been required to demonstrate that from a technical standpoint it was feasible to continue with the project. This is suggested by the project supervisor's statement that "We were evaluating what we could do" (note 49, *supra*). It is significant that the statement in the contractor's letter of February 20, 1973, about the Park Service obtaining permission to place sand on the land of private property owners (note 105, *supra*), indicates that the contractor was unaware that the Government considered itself "bound" to spend the appropriated funds involved "on Federally owned lands" (note 49, *supra*). In this connection we note that these problems required solutions only if the project were to be continued and, as has been noted, the appellant was interested in having the project continued.

While the issuance of the stop order undoubtedly inconvenienced the contractor and increased its costs somewhat, these considerations are not determinative of whether the contracting officer acted properly in directing the contractor to suspend the work for the convenience of the Government.[108] Lastly, we note that Mr. MacDonald has acknowledged that some small savings could result to the Government from the issuance of the stop order.

In connection with the 3 weeks that elapsed between the end of the February 10–12, 1973, storm and the issuance of the stop order on March 6, 1973, the Board has considered the following factors: (i) approximately one-third of the time involved had been consumed before the contractor wrote its letter of February 20, 1973; (ii) the course of action proposed by the contractor did not take into account the fact that the appropriation involved required the contract funds to be expended on federally owned lands; (iii) since mobilization had occurred months before (note 6, *supra*), there is no indication that

[108] *Cf. Greenwich Demolition Corporation*, GSBCA No. 3077 (October 26, 1970), 70–2 BCA par. 8543 at 39,723 ("Unmistakably, Appellant was inconvenienced by the pile driving delay. However, convenience or inconvenience of the parties cannot be weighed against each other for the purpose of determining if Appellant is entitled to an adjustment under the Suspension of Work clause which deals with convenience of the Government.").

the inconvenience and cost to the contractor would have been any less if the stop order had been issued at an earlier date than it was; and (iv) the unequivocal and uncontradicted testimony of the contracting officer that the issuance of the stop order was related only to the February 10–12, 1973, storm and to nothing else. Based upon the factors enumerated, we find that the Government did not delay unreasonably in issuing the stop order and that there is nothing in the evidence to indicate that any benefit would have inured to the contractor from the issuance of the stop order at an earlier time.

With respect to the question of whether work was suspended for an unreasonable period of time, we note the statement in appellant's claim letter of August 15, 1973 (Exhibit 21), that "the stop order was only in effect for five (5) working days." According to the uncontradicted and unimpugned testimony of both the contracting officer and the project supervisor the stop order was necessary in order for the Government to determine what should be done. Both witnesses refer to the serious problem created by the fact that they were limited by the appropriation involved to spending money on federally owned lands and that much of such lands had been inundated by the ocean. We note that within 1 week from the time the stop order was lifted on March 13, 1973, the Government issued Change Order No. 1 under date of March 20, 1973, reflecting a plan which permitted the contractor to proceed with the work and yet remain on federally owned lands unless the contractor chose "to negotiate with private landowners for access across their lands" (Note 12, *supra*).

Before concluding we wish to take note of the fact that 500,000 cubic yards of sand had been lost in the February 10–12, 1973, storm (note 10, *supra*). We also note that a formidable problem faced the Government in having to devise a plan for proceeding with the work which would not only take into account the devastation wrought by the storm but also the limitation upon the use of appropriated funds.

We find that the appellant has failed to show that in issuing the stop order on March 6, 1973, and continuing it in effect until March 13, 1973, the contracting officer acted unreasonably or suspended the work for an unreasonable period of time. The claim for costs attributed to the stop order [109] is therefore denied.

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[109] The appellant offered no evidence at the hearing as to the reason for the 5-month delay in asserting the suspension of work claim. The Notice of Appeal states at page 9: "* * * the contracting officer is well aware by reason of his familiarity with the contractor's costs and expenses that $6,000 per day for the 14 days in question (is) a very reasonable and proper allowance."

Presumably the contractor can be expected to know at least as much as the contracting officer about its own costs. No reason is perceived why this particular claim could not have been filed in late March or early April of 1973. The fact that it was not filed until mid-August raises a question as to whether the claim was "asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption" within the meaning of the Suspension Of Work clause.

Claim for time extension ($1,400)

The claim letter of August 15, 1973 (Exhibit 20), requests time extensions based upon (i) the manner in which the Government had directed the fill to be placed (note 18, *supra*) and (ii) supplier delays attributed to the same cause (note 19, *supra*). In his decision of November 29, 1973 (Exhibit 12), the contracting officer denied the request for time extension on the grounds that there had been no departure from the terms of the contract and delays of suppliers are not a proper basis for granting an extension of time under Clause 5 of the General Provisions.

In the Notice of Appeal of December 27, 1973 (Exhibit 7), the appellant offers the following explanation of its delay in completion:

> 1. The contractor has requested additional time for completion of the project because of the departure from the contract provisions * * *. The pumping of all of the fill * * * to the northern two-thirds of the project * * * severely affected the production of the contract in terms of yards pumped per day and greatly increased the deterioration of its pumps by reason of the great pressure required to pump sand a longer distance for a longer time. * * *
>
> 2. * * * It is the position of the contractor that the departure from the contract alone is sufficient to justify the additional time and that the delay of suppliers occasioned by the departure from the contract affords sufficient basis [110] for the requested extension.

Decision

We have previously found that the contractor is entitled to an equitable adjustment under the Changes clause for the increased costs resulting from the placement of beach fill as directed by the Government. We find that the inability or failure of the Government to adhere to the typical cross-section shown on the contract drawings in directing the placement of the fill also increased the time required for performance of the contract and that the contractor is entitled to an equitable adjustment therefor as provided for in the Changes clause.

The claim for time extension is therefore granted as to liability and in accordance with the stipulation of the parties [111] is remanded to the contracting officer for determina-

We need not reach this question, however, where, as here, we find the claim to be without merit. See *Electrical Enterprises, Inc.*, note 76, *supra*, 81 I.D. 120–122, 74–1 BCA at 49,865–866.

[110] In its posthearing brief appellant states at page 22: "While supplier delay is not, *per se*, justification for an extension of time, where supplier delay is, as in this case, related to the actions of the United States, an extension of time is in order. See *Appeal of Shurr & Finlay, Inc.*, IBCA–644–5–67 (8/27/68), 75 I.D. 248 (68–2 BCA par. 7200). The evidence establishes that the booster pumps were operating in a wide open condition for a long period of time which wore out the pump shells. Appellant's supplier was unable to furnish the shells as promptly as needed. The action of the United States is inexorably tied to the supplier problem and, thus, the usual rule of supplier default is not applicable."

[111] The stipulation (note 72, *supra*) provides in part: "2. In the event Appellant is determined to be entitled to any of the three claims it has asserted herein, the parties propose to negotiate the quantum thereof with this Board to retain jurisdiction for the purpose of finally resolving the quantum issue in the event the parties are unable so to do by way of negotiation."

tion in the first instance of the time extension to which the contractor is entitled.

Summary

1. The claim for misplacement of fill and the claim for a time extension are granted as to liability and pursuant to the stipulation between the parties are remanded to the contracting officer for determination of the amount of the equitable adjustment to which the contractor is entitled upon the understanding that if the parties are unable to reach an agreement, the contracting officer shall render a written decision from which the contractor may again appeal to this Board.

2. The Suspension of Work claim is denied.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

WE CONCUR:

SPENCER T. NISSEN,
Administrative Judge.

G. HERBERT PACKWOOD,
Administrative Judge.

EASTERN ASSOCIATED COAL CORPORATION

5 IBMA 185

Decided *September 30, 1975*

Cross appeals by Eastern Associated Coal Corporation and the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Charles C. Moore, Jr., with respect to the following civil penalty proceedings filed under section 109 of the Federal Coal Mine Health and Safety Act of 1969: Docket Nos. MORG 73-131-P, MORG 73-141-P, MORG 73-145-P, HOPE 73-305-P, HOPE 73-365-P, HOPE 73-382-P, HOPE 73-465-P, HOPE 73-582-P, HOPE 73-634-P, and HOPE 73-635-P.

Affirmed in part, vacated in part, reversed in part, and remanded in part.

1. Federal Coal Mine Health and Safety Act of 1969: Hearings: Notice and Service

An operator must be given adequate notice of the charge in a civil penalty proceeding brought under section 109 of the Act. 30 U.S.C. § 819 (1970). Failure by an operator to object to lack of due notice below, if the opportunity arises, results in a waiver of a claim of error based thereon.

2. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Permissibility: Switches on Electric Face Equipment

The failure to maintain the reset mechanism on electric face equipment switches in operational condition is a violation of an operator's obligation under 30 CFR 75.505 to maintain electric face equipment in permissible condition. 30 U.S.C. § 878(1) (1970), 30 CFR 75.520.

3. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Permissibility: Brakes on Electric Face Equipment

The failure to maintain the brakes on an off-standard shuttle car in operational condition is a violation of the operator's obligation under 30 CFR 75.503 to maintain electric face equipment in permissible condition. 30 CFR 18.20(f).

4. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Permissibility: Schedule 2 G

Schedule 2 G, codified at 30 CFR Part 18, was effectively republished in accordance with section 101(j) of the Act, 30 U.S.C. § 811(j) (1970), at 35 FR 17890 (November 20, 1970), where it was incorporated under 30 CFR 75.506.

5. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Permissibility: Generally

Once a permissibility specification becomes effective, machinery already or subsequently equipped with a part covered thereby cannot be maintained in permissible condition unless that part is kept in operational status.

6. Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Maintenance of Electric Equipment

Proof of defective brakes on a roof bolt machine and of a missing guard on a belt chain drive constitutes *prima facie* evidence of a failure to maintain electric equipment "properly." 30 CFR 75.512.

7. Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Sufficiency of Evidence

Under 30 CFR 70.220(a)(3), 35 FR 5544 (April 3, 1970), MESA must prove the existence of an underlying notice of violation of 30 CFR 70.100 (a) or (c) if the existence of such notice is in issue.

8. Federal Coal Mine Health and Safety Act of 1969: Penalties: Criteria: Official Notice

Where an Administrative Law Judge bases ultimate findings of fact upon officially noticed facts and leaves the record open for submission of rebuttal, the failure to take advantage of such opportunity for rebuttal results in waiver of objections.

9. Federal Coal Mine Health and Safety Act of 1969: Respiratory Dust Program: Generally

An operator may challenge whether scientific procedures set forth in the regulations were being complied with in a given case, but may not raise issues regarding their scientific reliability in an administrative proceeding inasmuch as such issues would pertain to the validity of the Secretary's regulations, a matter beyond the authority of the Board.

APPEARANCES: Daniel M. Darragh, for appellant—cross-appellee, Eastern Associated Coal Corporation; Richard V. Backley, Esq., Assistant Solicitor, Michael V. Durkin, Esq., W. Hugh O'Riordan, Esq., and Leo McGinn, Esq., Trial Attorneys, for appellee—cross-appellant, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural and Factual Background

On December 16, 1974, subsequent to an evidentiary hearing, Administrative Law Judge Charles C. Moore, Jr., issued his decision in the above-listed civil penalty dockets pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 819 (1970). Judge Moore found that 14 violations occurred as cited and assessed

civil penalties against Eastern Associated Coal Corporation (Eastern) in the aggregate amount of $3,000. He also concluded that the Mining Enforcement and Safety Administration (MESA) failed to adduce sufficient evidence to sustain 22 of its charges.

Both Eastern and MESA subsequently filed notices of appeal with the Board. 43 CFR 4.600. Eastern's appeal was docketed as IBMA 75–23, and MESA's cross-appeal was designated IBMA 75–25. Pursuant to an unopposed motion by Eastern, we are hereby consolidating these appeals inasmuch as they arise out of the same initial decision.

Eastern has requested oral argument which we hereby deny. We have concluded that such argument would not materially assist us in the disposition of these appeals, and would indeed produce unnecessary delay. 43 CFR 4.25.

Issues on Appeal

A.

IBMA 75–23

Whether the Administrative Law Judge correctly found violations of the following regulations: 30 CFR 75.200, 75.505, 75.503, 75.512, and 70.220(a)(3).

Whether the Administrative Law Judge erred in his general consideration of the impact of any penalties on Eastern's ability to continue in business and of Eastern's alleged history of previous violations.

B.

IBMA 75–25

Whether the Administrative Law Judge erred in vacating 22 notices of violation of the Secretary's respirable dust standards.

Discussion

A.

IBMA 75–23

1. *Determinations of Violation*

Order of Withdrawal 1 CJT, April 24, 1972, MORG 73–141–P

[1] In pertinent part, the subject citation reads as follows: "The shuttle cars have rubbed the roof and dislodged two roof bolts which are hanging down six inches at the brow of the boom hole."

Based upon the above-quoted portion of the subject withdrawal order, Judge Moore concluded that Eastern violated the approved and effective roof control plan. On appeal, Eastern contends: (1) that it did not receive adequate notice that it was being charged with a violation of its roof control plan; (2) that MESA failed to establish a *prima facie* case in that it did not produce a copy of the pertinent provisions of the subject roof control plan; and (3) that the Judge erred in finding that the alleged violation was serious on the basis of the Board's finding of imminent danger in an earlier application for review proceeding.[1] In its reply

[1] *Eastern Associated Coal Corp.*, 2 IBMA 128, 80 I.D. 400, 1971–1973 OSHD par. 16,187

brief, MESA did not respond to Eastern's first assignment of error. With regard to Eastern's second claim, MESA argues that it is not obliged to produce the pertinent provisions of a roof control plan for the record where the inspector's testimony with regard to the content of those provisions is uncontroverted, as it contends was the case here. With regard to the third contention on appeal, MESA merely asserts that the Judge's conclusion that the alleged violation was serious is supported by the record, but supplies neither transcript citations nor references to exhibits.

Turning to the first assignment of error, we observe that the record reveals that at no time prior to the hearing below did MESA apprise the trier of fact or Eastern that the charge based on the above-cited withdrawal order was a deviation from the subject roof control plan. Certainly, that information cannot be drawn from the above-quoted portion of the withdrawal order and this proceeding was initiated at a time when the regulations did not require MESA to file a petition for assessment with the Hearings Division. We have said that adequate notice of the substance of a charge must be given so that a defense can be prepared. *See Old Ben Coal Corp.*, 4 IBMA 198, 82 I.D. 264, 1974–1975 OSHD par. 19,723 (1975). We agree with Eastern that there was inadequate notice in the instant case; however, we are of the opinion that the inadequacy is no basis for reversal or remand because the record reveals that Eastern defended on the merits and never objected to the admission of evidence with regard to the roof control plan. Accordingly, we conclude that Eastern waived its claim of lack of notice.

With respect to the second assignment of error, we find, contrary to MESA's assertion, that Eastern did contest the inspector's testimony concerning the provisions of the subject roof control plan. On cross-examination, where Eastern had its first opportunity to respond to the true charge before the Administrative Law Judge, counsel sought to discredit the inspector's testimony by showing its vagueness and unreliability. At no point did Eastern ever indicate that it acquiesced in MESA's representations concerning the content of the subject roof control plan. We are of the opinion that, in these circumstances, where there was no stipulation as to the content of the pertinent provisions of the roof control plan and the operator resisted MESA's representations with respect to it, MESA was obliged to produce the relevant parts of the plan.[2] Having failed to do so, MESA failed to sustain its charge. Accordingly, we are reversing the decision below in pertinent

(1973), *aff'd sub nom, Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals*, 491 F. 2d 277 (4th Cir. 1974).

[2] *Compare Eastern Associated Coal Corp.*, 3 IBMA 331, 344, 81 I.D. 567, 1974–1975 OSHD par. 18,706, *aff'd on reconsideration*, 3 IBMA 383, 81 I.D. 627, 1974–1975 OSHD par. —— (1974).

part and vacating the assessment of $1,000.

Notice of Violation No. 4 SBP, March 3, 1972, MORG 73-145-P

[2] The above-cited notice concerned stop and start switches on the pump motor of a continuous miner and on the gathering motor of the loading machine, respectively, which were found by the inspector not to be in proper operating condition. At the hearing below, the inspector identified the defect as a failure of the reset mechanism of the switch to work. Eastern admits that the inspector's observation was accurate.

The Judge concluded that the condition described in the subject notice constituted a violation of Eastern's obligation to maintain electric face equipment in permissible condition. 30 CFR 75.505. On appeal, the parties center their arguments upon the meaning and validity of 30 CFR 75.506(b). However, we find it unnecessary to deal with these contentions because in our opinion the latter regulation is irrelevant.

Under section 318(i) of the Act, 30 U.S.C. § 878(i) (1970), the subject switches are "features" of electric face equipment which must be "* * * designed, constructed, and installed, in accordance with the specifications of the Secretary * * *," to prevent, to the maximum extent possible, any accidents. The specification for permissibility adopted by the Secretary with respect to switches is contained in 30 CFR 75.520, rather than 30 CFR 75.506(b), and requires that switches on electric equipment be "designed, constructed, and installed" "safely." In our view, switches of the type now under discussion cannot meet this specification unless they are equipped with reset mechanisms. In the absence of such a mechanism, machinery could suddenly activate after a power interruption and catch an unwary miner by surprise, with disastrous consequences. The reset mechanisms of the subject switches were apparently designed, constructed, and installed to comply with this specification of permissibility and the failure to maintain them in an operational status was, as the Judge concluded, a failure to maintain electric face equipment in permissible condition. Accordingly, the findings and conclusion of violation and the assessment of $400 will be affirmed.

Notice of Violation 2 BLW, September 14, 1972, HOPE 73-634-P

[3, 4] The subject notice cited Eastern for malfunctioning brakes on an off-standard shuttle car. Eastern admits that the condition observed by the inspector did exist.

The Judge concluded that Eastern had violated its obligation under 30 CFR 75.503 to maintain the subject piece of equipment in permissible condition. He identified the source of the permissibility requirement as 30 CFR 18.20(f).

On appeal, Eastern contends: (1) that 30 CFR 18.20(f) is no longer an effective regulation; (2) that MESA failed to establish a *prima*

facie case in that it did not prove the date of manufacture; and (3) that MESA failed to establish a *prima facie* case in that it did not identify the precise standard that was eventually found to have been violated.

With respect to the first contention, we note that 30 CFR 18.20(f) is part of a series of regulations which are collectively also known as Schedule 2 G. 30 CFR 18.1–18.82.[3] These regulations were promulgated originally under section 5 of the Act of May 16, 1910 (36 Stat. 370), *as amended*, 30 U.S.C. § 7 (1970), and section 212(a) of the Federal Coal Mine Safety Act of 1952 (66 Stat. 709), 30 U.S.C. § 482 (a), *as amended*, March 26, 1966 (80 Stat. 91). They were published at 33 FR 4660 (March 19, 1968), and were continued in effect under section 318(i) of the Act, 30 U.S.C. § 878(i) (1970). In accordance with section 101(j) of the Act, 30 U.S.C. § 811(j) (1970), they were effectively republished at 35 FR 17890 (November 20, 1970), where they were incorporated by reference as Schedule 2 G, March 19, 1968, under 30 CFR 75.506 (a) and (b). Whether such republication as was accomplished was sufficient to comply with section 101(j) of the Act is a question of regulatory validity and we have held repeatedly that such matters are beyond our authority. *E.g.*, *Buffalo Mining Co.*, 2 IBMA 226, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973). Accordingly, we conclude that 30 CFR 18.20(f) is still an effective regulation.

[5] With respect to Eastern's second contention regarding the lack of proof of the date of manufacture, we are of the opinion that it is a frivolous assertion. Once a permissibility specification such as 30 CFR 18.20(f) becomes effective, machinery *already* or subsequently equipped with a part covered thereby cannot be maintained in permissible condition unless that part is kept in operational status. It was unnecessary to prove the precise date of manufacture since the permissibility specifications that were then in effect did not constitute an exhaustive list of maintenance obligations in effect under 30 CFR 75.505 and 75.506(b) on the date the subject notice was issued.

Finally, with respect to Eastern's third contention regarding MESA's failure to specify the precise source of the standard alleged to have been violated, we are of the view that it too is without merit. That omission goes to whether Eastern was given adequate notice of the charge and not, as Eastern appears to contend, to whether MESA adduced in its case-in-chief a sufficient quantum of evidence to support favorable findings of fact and conclusions of law, and to shift the burden of going forward. *Armco Steel Corp.*, 2 IBMA 359, 80 I.D. 790, 1973–1974 OSHD par. 17,043 (1973). The question of adequate notice was apparently not raised below and, therefore, cannot be presented on appeal.

[3] *See Kaiser Steel Corp.*, 3 IBMA 489, 81 I.D. 747, 1974–1975 OSHD par. 19,149 (1974).

For the foregoing reasons, we affirm the subject findings and conclusion of violation, as well as the assessment of $400.

Notices of Violation 1 HLP, March 3, 1972, HOPE 73-305-P; 2 MCS, April 20, 1972, HOPE 73-634-P; 4 HDC, August 29, 1972, HOPE 73-635-P

[6] Notices 1 HLP and 2 MCS cited Eastern for defective brakes on roof bolt machines. Notice 4 HDC dealt with a missing guard on a belt chain drive. Eastern admits that the conditions did exist.

The Judge concluded in each instance that Eastern had violated 30 CFR 75.512.

On appeal, Eastern contends: (1) that MESA failed to establish a *prima facie* case in each instance in that it did not prove that Eastern had knowledge of the subject conditions and had failed to hold the minimum weekly examinations; and (2) that, under the inspector's manual in effect at the time the subject violations were cited, safeguard notices should have been issued pursuant to 30 CFR 75.503.

Section 75.512 of 30 CFR provides as follows:

> All electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

Under the above-quoted regulation, failure to conform to requirements set forth in each sentence constitutes a separate and distinct violation. Where MESA shows, as it did in the matters at hand, that a piece of electric equipment was found by an inspector to be defective in a manner which could cause an accident, it has established a *prima facie* case of failure to maintain the subject piece of equipment "properly" under 30 CFR 75.512. Eastern's first contention is, therefore, without merit.

With respect to the second contention, we note that the inspector's manual in effect at the time that the subject violations were issued was the *Coal Mine Safety Inspection Manual for Underground Mines* dated December 1971. With respect to the above-quoted regulation, that manual provides in pertinent part as follows:

> * * * If an authorized representative of the Secretary * * * finds any potentially dangerous conditions on * * * equipment, he shall issue a Notice of Violation of this section (except that failure to maintain permissibility shall be cited under 75.503.) * * *

A close reading of this language reveals that inspectors were not under instructions to issue safeguard notices, as Eastern contends. It is true, however, that it appears that where the inspector had a choice, as in the matters at hand, of issuing a notice of violation under 30 CFR 75.512 or under 30 CFR 75.503,[4] he was

[4] The applicable permissibility requirements at the time the subject notices were issued are set forth at 30 CFR 18.20 (e) and (f).

supposed to choose the latter course of action. We need not, however, decide whether the failure of the inspectors in the matters at hand to follow the above-quoted guidelines for the exercise of enforcement discretion was error. Even assuming, *arguendo*, that it was error, such error was not prejudicial to Eastern because there is no material difference in the proof that would have been necessary to sustain the validity of the subject notices if they had been issued instead in accordance with above-quoted instructions which are not required by either the Act or the Secretary's regulations.

Accordingly, we are affirming the subject findings and conclusions of violation and the associated assessments of $400, $400, and $200, respectively.

Notices of Violation 1 AP, May 26, 1972, HOPE 73-382-P; 1 AP, August 22, 1972, HOPE 73-465-P; 1 AP, June 13, 1972, HOPE 73-365-P

[7] Each of these notices was issued following Eastern's alleged failure to submit the required number of samples of respirable dust after receiving a notice of noncompliance with 30 CFR 70.100. The regulatory obligation in question is imposed by 30 CFR 70.220(a)(3), 35 FR 5544 (April 3, 1970), which reads as follows:

> Upon issuance of a notice of violation of paragraph (a) or (c) of § 70.100 of this part with respect to any working section of a coal mine, paragraph (a) of this section shall not apply in respect of that working section until the violation is abated, and the operator shall take samples with respect to that working section during each production shift as required by § 104(i) of the Act.

The Judge concluded that the violations at issue did occur and assessed a $25 penalty in each instance.

On appeal, Eastern raises several claims of error. First, it argues that MESA is obliged as part of its *prima facie* case to prove that an underlying notice of violation was issued under 30 CFR 70.100 (a) or (c). Second, it claims that MESA must prove that the underlying notice was valid. Finally, it submits that there must be some reason other than the issuance of such a notice to justify the requirement of extra sampling.

While the latter two contentions have no merit, the first does. The regulatory obligation under 30 CFR 70.220(a)(3) is by its terms triggered by the *issuance* of an appropriate underlying notice, whether valid or not. MESA has copies of such notices in its records, and where the existence of such notices is put in issue, it cannot establish a *prima facie* case under the subject standard without introducing them for the record. Accordingly, we are reversing the decision below with respect to the subject notices of violation and vacating the associated assessments.

2. *General Treatment of Assessment Criteria*

[8] At the outset of his opinion, the Administrative Law Judge ap-

parently took official notice of the alleged facts that Eastern is one of the larger operators in the industry and that it has been involved in previous civil penalty proceedings. Based upon these officially noticed facts, the Judge concluded that the penalties he would assess would not adversely affect Eastern's ability to continue in business and that there was a history of prior violations.

The judge left the record open for 10 days so that Eastern could rebut the products of official notice. (*Dec.* 2, n. 2.) Having failed to take advantage of that opportunity, Eastern waived its objections. In addition, with respect to his conclusion that Eastern's ability to continue in business would be unaffected, the Judge need not have based his determination on official notice, but could have presumed that such was the case in the absence of evidence to the contrary. *Hall Coal Company*, 1 IBMA 175, 79 I.D. 668, 1971–1973 OSHD par. 15,380 (1972). Accordingly, we see no reason to overturn the Judge's conclusions although our affirmance should not be taken as agreement that the matters in question were subject to official notice or that the products of official notice had the probative value attributed to them by the Judge. 43 CFR 4.24 (a) (3) and (b).

B.

IBMA 75–25

[9] MESA filed its notice of appeal in the above-captioned case in order to challenge the portion of the Judge's opinion and order in Docket Nos. HOPE 73–305–P, HOPE 73–382–P, HOPE 73–465–P, MORG 73–131–P, and MORG 73–145–P, wherein he vacated 22 notices of violation of 30 CFR 70.100(a). That regulation provides as follows:

> **Effective June 30, 1970, each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 3.0 milligrams of respirable dust per cubic meter of air.**

The Judge based his determination upon certain inaccuracies that he perceived in the sampling system used to enforce the above-quoted regulation and upon the alleged futility of discovery which he thought effectively denied the right to a hearing which is provided for in section 109(a)(3) of the Act. 30 U.S.C. § 819(a)(3) (1970).

On appeal, MESA contends that the sampling system does yield accurate results and that Eastern's challenge to the reliability of the scientific method sanctioned by the regulations should be rejected. MESA also argues that the Judge erred in concluding that Eastern had been effectively denied its hearing right on account of the alleged futility of discovery.

In *Castle Valley Mining Company*, 3 IBMA 10, 14, 81 I.D. 34, 1973–1974 OSHD par. 17,233 (1974), we said that an operator may challenge the sampling system at any stage. By that dictum, we meant only that an operator may

challenge whether the system of sampling set up by the regulations is being complied with at any stage of the processing by MESA. *Castle Valley* is not to be read for the proposition that the scientific reliability of that system may be attacked in adjudicatory proceedings in the Office of Hearings and Appeals. Any such issue concerning the subject notices raises questions regarding statutory and possibly constitutional validity of the regulations, matters which are beyond our authority. Questions of statutory and constitutional validity of the Secretary's regulations can be raised in the appropriate federal court at the proper time for a ruling which is binding upon the Secretary. Moreover, although a rulemaking proceeding can have no effect on the subject proceeding, Eastern could attempt to present its general complaints to the Secretary by petitioning him to engage in rulemaking. 5 U.S.C. § 553(e) (1970). Accordingly, to the extent that the Judge based his decision upon the alleged scientific unreliability of the testing methods prescribed or allowed by the regulations, he was in error.

With respect to the supposed denial of the operator's statutory and regulatory right to a hearing, the Judge concluded that discovery was essentially an exercise in futility because the operator cannot determine who actually processed any samples determined to be in violation and cannot send its own experts to the MESA laboratory to retest any samples that it wishes to challenge.

An examination of the record in the case at hand reveals that Eastern never formally sought to identify the individuals who were responsible personally for the handling of the samples involved in the subject notices of violations. The Judge had no basis in the record for his conclusion that if Eastern had sought to depose or submit interrogatories to the employees of the Department who actually performed the subject laboratory analyses and reporting process, the identities of those persons would have been unavailable. The Judge was therefore in error when he concluded that discovery was a futile exercise.

In addition, quite apart from whatever evidence may be derived from discovery, there is no reason why operators such as Eastern cannot establish a parallel sampling process based upon the Department's regulations in order to impeach the reliability of the results of the analyses prepared by MESA. It seems to us therefore that the unavailability of the samples submitted to MESA for retesting is not an absolute impediment to mounting a challenge to the accuracy of the test results reported by MESA.

For the foregoing reasons, we are reversing the Judge's decision with respect to the subject 22 notices of violation, finding that the violations occurred as cited, and remanding with instructions to assess appropriate civil penalties.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that Eastern's motion to consolidate the above-captioned appeals IS GRANTED and its request for oral argument IS DENIED.

IT IS FURTHER ORDERED with respect to the above-listed dockets involved in Appeal No. IBMA 75-23:

(1) that the findings of fact, conclusions of law, and the assessments based upon Notices of Violation 4 SBP, March 3, 1972, 2 BLW, September 14, 1972, 1 HLP, March 3, 1972, 2 MCS, April 20, 1972, and 4 HDC, August 29, 1972, ARE AFFIRMED;

(2) that the general findings on the impact of any assessment upon Eastern's ability to continue in business and on Eastern's history of previous violations ARE AFFIRMED;

(3) that the decision below based upon Order of Withdrawal 1 CJT, April 24, 1972, and Notices of Violation 1 AP, May 26, 1972, 1 AP, August 22, 1972, and 1 AP, June 13, 1972, IS REVERSED and the assessments based thereon ARE VACATED; and

(4) that Eastern SHALL PAY civil penalties in the aggregate sum of $1,925 on or before 30 days from the date of this decision.

IT IS ALSO ORDERED, with respect to the subject notices of violation in the above-listed dockets involved in Appeal No. IBMA 75-25, that the decision below IS REVERSED and the case IS REMANDED with instructions to assess appropriate civil penalties in accordance with section 109(a)(1) of the Act. 30 U.S.C. § 819(a)(1) (1970).

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

PEGGS RUN COAL COMPANY, INC.

5 IBMA 175

Decided *September 30, 1975*

Appeal by the Mining Enforcement and Safety Administration from that part of a decision, by Administrative Law Judge George A. Koutras (Docket No. PITT 74-585-P), dated March 6, 1975, in which he vacated a notice charging Peggs Run Coal Company, Inc., with a violation of 30 CFR 77.410 in a penalty assessment proceeding pursuant to section 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Party to be Charged

Where trucks owned by a haulage contractor operate without backup alarms on coal mine property in violation of 30 CFR 77.410, and thus endanger the miners employed by the principal coal mine operator, the proper party to be charged in the resulting notice of violation is the

principal coal mine operator, since it has the direct responsibility to assure the health and safety of such miners.

APPEARANCES: Richard V. Backley, Esq., Assistant Solicitor, Leo McGinn, Esq., Trial Attorney, for appellant, Mining Enforcement and Safety Administration; John R. Carfley, Esq., for appellee, Peggs Run Coal Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

At the outset, we call attention to the fact that an appeal by the operator, from the decision by Judge Koutras in Docket No. PITT 74–585–P, was decided by the Board in its Amended Memorandum Opinion and Order, Appeal No. IBMA 75–48, 5 IBMA 3, dated August 15, 1975. In that proceeding, we upheld the assessment of penalties in the amount of $425. Here, we are involved solely with an appeal by the Mining Enforcement and Safety Administration (MESA) from that part of the same decision which vacated a notice charging Peggs Run Coal Company, Inc. (Peggs Run) with a violation of 30 CFR 77.410.[1] For the reasons set forth below, we have decided to reinstate that notice and assess a civil penalty in the amount of $100 against Peggs Run for violation of the cited mandatory safety standard.

Factual and Procedural Background

On September 18, 1973, John M. Hornick, a Federal mine inspector for MESA, issued the subject notice in the course of an inspection of the No. 2 Mine of Peggs Run, located at Shippingport, Pennsylvania. The notice cites the following condition:

> Three of the trailer trucks being loaded with coal on the surface was [sic] not provided with an automatic warning device that would give an audible alarm when such equipment was put in reverse.

On November 6, 1974, a hearing was held on the matter pursuant to Peggs Run's request. A brief summary of the evidence adduced therein follows. Peggs Run Coal Company had contracted with the Dutch Bloom Trucking Company (Dutch Bloom) to haul coal to various shipping sites. On September 18, 1973, the inspector observed three of Dutch Bloom's trucks operating on Peggs Run's premises without automatic backup warning devices as required by 30 CFR 77.410. The record evidence reveals that there were people constantly walking in the area (Tr. 24–25), that the inspector had informed the mine supervisor of the violation, and that the supervisor had informed Dutch Bloom thereof on at least one occasion prior to the issuance of the notice (Tr. 29, 93).

On March 6, 1975, Administrative Law Judge George A. Koutras

[1] In pertinent part, 30 CFR 77.410 provides: "Mobile equipment, such as trucks, * * * shall be equipped with an adequate automatic warning device which shall give an audible alarm when such equipment is put in reverse."

(Judge) rendered a decision concluding that Peggs Run was not the party responsible for the violation, thereby vacating the Notice of Violation 2 JMH, September 18, 1973. In his decision, the Judge made reference to the Board's test in *Affinity Mining Company*, 2 IBMA 57, 60, 80 I.D. 229, 1971–1973 OSHD par. 15,546 (1973), *viz.*, "while more than one person may fall technically within the definition of 'operator,' only the one responsible for the violation and the safety of employees can be the person served with notices and orders and against whom civil penalties may be assessed." The Judge's application of the test to the instant facts found Dutch Bloom liable and the proper party to have been charged with the violation:

> With respect to the question of who is responsible for the violation and safety of employees, I can envision a situation where the mine operator is liable for the safety of its miners and thus owes a duty to insure that they are not injured by trucks without warning devices, but the trucker-contractor who failed to provide his trucks with warning devices is the party responsible for the violation. (D. 12.)

With respect to the issue of supervision over the drivers, the Judge found the evidence insufficient to establish that Peggs Run exercised such daily control as to create an agency or employer-employee relationship.

Contentions of the Parties

In its Brief MESA argues that a reading of the Act and its legislative history strongly supports the conclusion that the only party to be assessed for civil penalty violations is an operator. It admits that there may be more than one operator, but holds primarily responsible that operator who has control of the mine and the obligation of providing for the employees' safety. MESA contends that the record evidence distinguishes this case from *Affinity* in that Peggs Run exercised sole supervision at the subject mine whereas the only supervisory personnel at Affinity's mine were employees of the independent contractor (Tr. 89). It maintains that Dutch Bloom neither "operated, controlled, nor supervised the Peggs Run No. 2 Mine at any time * * *." (B. 9.) Finally, it contends that responsibility for providing the warning alarms rested on Peggs Run, citing Restatement (Second) of Torts § 416 (1957):

> One who employs an independent contractor to do work which the employer should recognize as likely to create a peculiar risk or physical harm to others *unless special precautions are taken*, is subject to liability for physical harm caused by the failure of the independent contractor to take such precautions even though the employer has provided for such precautions in the contract or otherwise. (B. 14.) Italic added.

MESA draws from the legislative history of the Act to characterize a coal mine operation as "extremely hazardous," thus requiring the operator to take special precautions which, in this case, would be providing backup warning devices on the trucks.

Peggs Run admits that it informed Dutch Bloom of the re-

quirement for backup devices, but contends its responsibility terminated at that moment as it had:

> * * * no control over the maintenance of the vehicles nor could it direct which vehicles out of the trucking company's fleet of vehicles would, on any particular day, appear at the mine for the purpose of transporting coal. (B. 1.)
>
> * * * * *
>
> * * * And since the operator has absolutely no control over which trucks will be routed to the mine for performance of the contract, it has no recourse but to instruct the independent contractor of the requirements and attempt to insure the safety of the miners through compliance by the contractor. If, however, the contractor fails to follow the instructions of the operator, MESA and not the operator is vested with the power to impose economic sanctions by way of a penalty proceeding. (B. 3.)

The essence of Peggs Run's brief thus focuses the issue not on the question of delegation of responsibility but on the matter of control over the instrumentality involved, to wit, Dutch Bloom's trucks. (B. 2–3.) It further contends that Peggs Run did not supervise the truck drivers on a daily basis so as to create an agency relationship; that it had no control over which routes the drivers followed; and that the only real relation it had with Dutch Bloom was manifested in a contract for the haulage of coal. (B. 3.)

Issue

Whether the Judge erred in finding that MESA did not charge the proper party with a violation of 30 CFR 77.410.

Discussion

[1] The Board has determined that MESA did charge the proper party for violating 30 CFR 77.410 and therefore reverses the Judge. Having examined the record evidence, we find that the instant facts are distinguishable from the factual situation in *Affinity* in which only employees and supervisory personnel of the contractor were present and endangered. Here, Peggs Run had some control over the route and the loading-station location of the trucks once they entered its mine property. In *Affinity*, the same party was responsible for both the existence of the conditions cited, the health and safety of the employees involved, and the sole power to abate the conditions.[2] The instant factual situation presents a division of these responsibilities, to wit, Dutch Bloom had failed to provide its trucks with backup alarms, while Peggs Run had the duty of insuring the safety of its miners in the loading area. No employees of Dutch Bloom were endangered. To effect the primary purpose of the Act—to provide miners with a safe working environment—the Board must liberally apply "responsible for the violation" as that phrase is

[2] The relevant parts of that decision read:

> "* * * while more than one person may fall technically within the definition of 'operator,' only the one responsible for the violation and the safety of employees can be the person served with notices and orders and against whom civil penalties may be assessed. 2 IBMA 57, 60.
>
> * * * * *
>
> "* * * This [issue of sole responsible operator] is a factual determination to be made on a case-by-case basis, * * *. *Id.* at 61."

used in *Affinity*. We do not believe that the power to directly abate the *physical* condition is the sole determinative factor in assigning this responsibility. In this particular instance the violation is one which is readily ascertainable with a minimum of effort, *i.e.*, whether trucks entering the property are equipped with automatic backup warning devices. We concede that it may not be the responsibility of Peggs Run to equip the trucks with such devices but we see no reason why Peggs Run with a minimum of diligence could not prevent such nonequipped trucks from operating in an area where its employees alone are endangered. It is in this context that we find Peggs Run responsible for the hazard created by the violation. Accordingly, we must conclude that under these circumstances Peggs Run was the proper party to be charged for the violation which endangered its employees to whom it owes the duty of providing safe working conditions.

At the hearing, counsel for Peggs Run and MESA stipulated as to: 1) the size of Peggs Run's business; 2) its ability to pay any fines assessed; 3) its good faith in abating all violations; and 4) Exhibit R–1 indicating a substantial history of previous violations. In lieu of a remand, the Board will make required findings of fact based upon the record evidence as to the remaining criteria of section 109(a)(1). *Buffalo Mining Company*, 2 IBMA 226, 230, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973). Peggs Run allowed three of Dutch Bloom's trucks to continue loading coal on its premises with full knowledge of the fact that they were without backup warning alarms. Accordingly, we find that Peggs Run was negligent in failing to exercise reasonable care by permitting the three defective trucks to be on its property. We also find the violation to be reasonably serious in that it presented a hazard of potential physical injury to miners in the loading area. Based upon the foregoing findings, we conclude that an appropriate penalty assessment for such violation is $100.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that that part of the Judge's decision vacating Notice of Violation No. 2 JMH, September 18, 1973, in the above-captioned case IS REVERSED; that said Notice is REINSTATED; and that Peggs Run Coal Company, Inc., pay a penalty of $100 in addition to the sum of $425 previously assessed in Appeal No. IBMA 75–48 within 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

ADMINISTRATIVE APPEAL OF RUTH PINTO LEWIS *v.* SUPERINTENDENT OF THE EASTERN NAVAJO AGENCY

4 IBIA 147

Decided *October 3, 1975*

Appeal from a decision refusing to declare and include certain lands as trust assets subject to the Department's probate jurisdiction.

DOCKETED AND AFFIRMED.

1. Patents of Public Lands: Effect

Remedy for errors of law, as well as for mistakes of fact, in the issue of a patent to land within the jurisdiction of the Department is a direct proceeding by a bill in equity to correct them.

APPEARANCES: Michael Celestre, Esq., for appellant, Ruth Pinto Lewis.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

This matter was referred to the Board of Indian Appeals for a decision by the Commissioner of Indian Affairs, pursuant to 43 CFR 4.354 (b).

Ruth Pinto Lewis, appellant herein, had appealed to the Commissioner of Indian Affairs from a decision of an Area Director upholding the decision of the Superintendent of the Eastern Navajo Agency, refusing appellant's request that Stock-raising Homestead, hereinafter described, be added to the trust inventory of Ignacio Pinto, deceased Navajo Indian, Census No. 9355. The land in question described as Sec. 32, T. 19, N., R. 5 W., New Mexico Meridian, was conveyed to the decedent in fee by United States Government Patent No. 061457, issued on April 2, 1942.

It is the contention of the appellant that the property in question should be subject to a trust by virtue of the Act of July 4, 1884 (23 Stat. 96) *as amended*, 43 U.S.C. § 190 (1970) which provides:

> Such Indians as may have been located on public lands, prior to July 4, 1884, or as may, under the direction of the Secretary of the Interior, or otherwise, thereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States. No fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever.

It is the further contention of the appellant that the tract in question is trust property by virtue of 43 U.S.C. § 1970, *supra*, notwithstanding the absence of language to that effect in the patent issued on April

2, 1942, and, therefore, should be included as part of the decedent's trust assets subject to the Department's probate jurisdiction.

For the reason hereinafter set forth the Board can see no reason to consider and pass on the appellant's first contention.

We are not in agreement with appellant's latter contention. Upon issuance of the patent some 30 years ago on April 2, 1942, legal title to the land in question passed from the United States to Ignacio Pinto, thereby removing the land from the jurisdiction of the Department. Accordingly, the Superintendent being without authority to declare and include the tract as a part of the decedent's trust assets or inventory, acted properly in refusing to do so. Any relief or remedy that the appellant may have in the matter lies with the courts.

[1] Remedy for errors of law, as well as for mistakes of fact, in the issue of a patent to land within the jurisdiction of the Department, is a direct proceeding by a bill in equity to correct them. *King* v. *McAndrews et al.*, 111 F. 860 (8th Cir. 1901). Moreover, a patent issued by the Land Department is a judgment by that tribunal, and a conveyance of legal title to land to the patentee in execution of the judgment. *U.S.* v. *Krause*, 92 F. Supp. 756 (W.D. Louisiana, Lake Charles Division, 1950).

NOW, THEREFORE, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), *as amended*, June 12, 1975, the decision of the Area Director, dated July 21, 1975, sustaining the decision of January 13, 1975, of the Superintendent of the Eastern Navajo Agency in refusing to declare and include as part of the decedent's trust assets or inventory be, and the same is hereby AFFIRMED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:
MITCHELL J. SABAGH,
Administrative Judge.

ESTATE OF TENIE TEANIE LENA JACK WAGON HILL REYES

4 IBIA 156

Decided *October 17, 1975*

Appeal from an Administrative Law Judge's decision denying petition to reopen.

Reversed and Remanded.

1. Indian Probate: Notice of Hearing: Generally—345.0

It is incumbent upon one claiming lack of notice of a hearing by the Interior Department to determine heirs of a deceased allottee to make a showing of such lack.

APPEARANCES: Steven M. Avery of the Wind River Legal Services, Inc., for appellant, Bernice Grace Wagon Duran Starr.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

This appeal filed by Bernice Grace Wagon Duran Starr, herein-

after referred to as appellant, through her attorney, Steven M. Avery, is from an Order Denying Petition to Reopen made and entered on November 15, 1974, by Administrative Law Judge William E. Hammett.

Tenie Teanie Lena Jack Wagon Hill Reyes, hereinafter referred to as decedent, an unallotted Washakie Utah Shoshone, died intestate on September 25, 1970, leaving trust property in both the Fort Hall Reservation in Idaho and the Wind River Reservation in Wyoming. A hearing to determine the decedent's heirs was held and concluded July 7, 1971, by Administrative Law Judge William E. Hammett. Thereafter, on November 2, 1971, an order determining the heirs was made and entered by Judge Hammett. In the order of November 2, 1971, *supra*, Pete Reyes, a non-Indian, was found to be the surviving spouse and entitled to an undivided one-half as to the Wyoming property and one-third as to the property in Idaho.

On September 18 and 25, 1972, petitions for rehearing were filed in the matter. Thereafter, on October 2, 1972, the Judge denied the petitions. On October 29, 1974, a Petition to Reopen was filed by the appellant Bernice Starr, Lydia Wagon Timbana, Ralph Wagon, and Floyd Wagon. In support of their petition the following allegations were made:

(a) That the appellant herein did not receive actual notice of the hearing nor was she in the vicinity of the Wind River Reservation during the time of posting of the notices of hearing.

(b) Disclaimer of marital status by Pete Reyes, purported common-law husband of decedent.

(c) That the disclaimer controverted the Montana Common-Law Marriage statute.

(d) That Reyes did not prove his marriage by clear and convincing proof.

The Judge on November 15, 1974, denied the petition to reopen giving the following reasons in support thereof:

(a) That there was presumptive evidence that she was aware of the order issued on November 2, 1971, wherein her mailing address was given as Crowheart, Wyoming.

(b) That the purported disclaimer by Reyes would not have invalidated, per se, a previously valid common-law marriage.

(c) That a common-law marriage between the decedent and Pete Reyes was established by clear and convincing evidence.

It is from the decision of November 15, 1974, that the appellant has appealed to this Board. The appellant bases her appeal on the following contentions:

> (1) that she had standing to file a Petition to Reopen Estate, and
>
> (2) that proof of marriage is lacking in the relationship between decedent and Pete Reyes, purported common-law husband of decedent.

Pertinent and relevant part of 43 CFR 4.242(a) under which the appellant bases her first contention provides:

> (a) Within a period of 3 years from the date of a final decision issued by an

> Administrative Law Judge * * * any person claiming an interest in the estate who had no actual notice of the original proceedings and who was not on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted may file a petition in writing for reopening of the case. * * *

There appears to be no question that the appellant had standing to file a petition to reopen under the foregoing provisions of 43 CFR 4.242. The affidavit filed by appellant in support of her petition to reopen stated, "I, the undersigned, do solemnly swear and affirm under oath that I did not receive actual notice of the original proceedings and was not in the vicinity of the Wind River Reservation of Wyoming while the public notices of the hearing were posted." Although the exact whereabouts of the appellant during that time is not required by the above-cited provisions of the code, she volunteered the information in her brief to the effect that she and her family were in the State of Oregon at that time. The Administrative Law Judge's own admission that the Notice of Hearing dated June 4, 1971, the Order Determining Heirs dated November 2, 1971, and the Order Nunc Pro Tunc dated November 5, 1971, which were sent to the appellant at her address at Crowheart, Wyoming, were returned undelivered appear to support her contention. The Administrative Law Judge's finding to the effect that appellant's Crowheart, Wyoming, address on her petition for rehearing filed September 25, 1972, was presumptive evidence that she was aware of the order which was issued November 2, 1971, is immaterial in that it does not address itself to the question of actual or public notice of the original proceedings.

This Board in the *Estate of Frank Jones*, 1 IBIA 345, 79 I.D. 697, 700 (1972), in considering the question of lack of notice held:

> [1] * * * It is incumbent upon one claiming lack of notice of a hearing by the Interior Department to determine heirs of a deceased allottee to make a showing of such lack. * * *

Considering the appellant's contention against the case above cited, we find that she has shown satisfactorily the lack of notice and that her petition for reopening should be granted and the matter remanded to the Administrative Law Judge for further proceedings.

As for the appellant's second contention regarding the validity of the purported common-law marriage of the decedent and Pete Reyes, this Board finds it unnecessary to consider the same at this time since the appellant will have ample opportunity to raise that issue whenever the matter is set for further proceedings by the Administrative Law Judge.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Administrative Law Judge's Order Denying Petition to Reopen dated November 15, 1974, is hereby REVERSED and the matter is REMANDED to the Administrative Law Judge for the purpose of conducting a rehearing and for the issuance of a decision based upon the

evidence presented during said proceedings.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

IN THE MATTER OF OLD BEN COAL COMPANY
(No. 24 Mine)

5 IBMA 211

Decided *October 20, 1975*

Applications for Review, Docket Nos. 75-246, 247, 249, 250, 251.

1. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Appeals

In the absence of a showing of good cause and the presence of objection by an opposing party, the Interior Board of Mine Operations Appeals will not grant an appellant leave to amend its brief on appeal so as to recast existing arguments or to raise new issues.

APPEARANCES: Thomas A. Mascolino, Esq., Assistant Solicitor and Robert J. Araujo, Esq., Trial Attorney, for appellant Mining Enforcement and Safety Administration; Robert A. Meyer, Esq., for appellee Old Ben Coal Company.

MEMORANDUM OPINION AND ORDER

INTERIOR BOARD OF MINE OPERATIONS APPEALS

On June 30, 1975, Administrative Law Judge Koutras issued his decision in the above-listed dockets. Subsequently, on July 18, 1975, the Mining Enforcement and Safety Administration (MESA) filed a notice of appeal. 43 CFR 4.600. MESA submitted a timely brief on August 7, 1975. Appellee, Old Ben Coal Company (Old Ben), filed a reply brief on August 25, 1975. 43 CFR 4.601.

This case is now before the Board for a ruling on a motion by MESA, filed on September 23, 1975, for leave to amend its brief by eliminating matters no longer at issue and by making unspecified additions so that MESA's current position on the appropriate interpretation of section 104(c) of the Act is stated. 30 U.S.C. § 814(c) (1970). MESA asserts that the granting of its motion would in no way prejudice the other parties in interest, Old Ben and the United Mine Workers of America (UMWA).

Although the UMWA did not avail itself of the opportunity to file a statement in opposition, Old Ben did so on October 2, 1975. 43 CFR 4.510.

Old Ben contends that once the issues are joined under 43 CFR 4.601, an appellant is precluded from bringing up new issues as a matter of law. Old Ben also argues in substance that, even assuming *arguendo* that new matters can be raised subsequent to the date that a case becomes ripe for decision, MESA's grounds for its motion for leave to amend do not constitute a showing of good cause. Old Ben also claims that prejudice would result

from the granting of the subject motion in that the decision would be delayed.

Insofar as MESA seeks leave to amend by eliminating certain issues, we see no reason why permission to file a statement withdrawing some of its claims of error should not be granted. Certainly, the granting of such permission will contribute to expeditious disposition and will not prejudice Old Ben in the specific outcome of this case.

[1] However, insofar as MESA seeks leave to amend in order either to rephrase existing arguments or to add new matters, we agree with Old Ben that no adequate showing has been made in this instance although we do not subscribe to the broader proposition that new matter can never be raised once an appellant's brief has been filed in accordance with 43 CFR 4.601. See *Eastern Associated Coal Corp.*, 4 IBMA 184, 195, 82 I.D. 250, 1974–1975 OSHD par. 19,693 (1975). What MESA seeks here is an *extraordinary* opportunity to attack the decision below either by recasting arguments originally made or by adding unspecified new ones, but the only showing of cause that we can discern from MESA's conclusory and vague motion is that there may have been a change in policy. If in fact such a change has occurred, we think that it does not constitute adequate justification for allowing the Government a second chance to come up with an argument it could have timely made in its initial brief. If anything, a change in policy, if that is what has occurred, would seem to suggest that withdrawal of the appeal is the appropriate course of action inasmuch as the case may have been litigated on an entirely different theory. In any event, we are disinclined to allow any appellant, let alone the Government, an additional opportunity to attack an initial decision after the filing of its brief in accordance with 43 CFR 4.601 unless all the parties in interest consent or waive objection and a showing of good cause has been made.

Furthermore, we reject MESA's assertion that prejudice will not result from allowing leave to amend beyond eliminating certain arguments it no longer desires to press on appeal. Since it did not submit the suggested amendments, we are not in a position to accept that claim.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the motion of MESA for leave to amend IS GRANTED insofar as it seeks an opportunity to withdraw certain issues on appeal, and IS DENIED insofar as it seeks to redraft arguments made in the existing brief or to add new ones.

DAVID DOANE,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.
Administrative Judge.

APPEAL OF VTN COLORADO, INC.

IBCA–1073–8–75

Decided *October 29, 1975*

Contract No. 52500–CT5–1005, EIS-Emery Generating Station, Bureau of Land Management.

Motion to Remand Granted.

1. Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Notice of Appeal

Where an appeal is timely the absence from a contracting officer's letter of a terminal paragraph advising the contractor of his right of appeal under the Disputes clause is not a basis for remand to the contracting officer.

2. Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction and Operation: Allowable Costs—Contracts: Construction and Operation: Changes and Extras—Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Notice of Appeal

Claims of constructive change under a cost-plus-fixed-fee contract first presented in the notice of appeal are outside the jurisdiction of the Board and are remanded to the contracting officer for the issuance of new or supplemental findings.

APPEARANCES: Frederick L. Ginsberg, Jacqueline S. Davis, Attorneys at Law, Denver, Colorado, for appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY CHIEF ADMINISTRATIVE JUDGE McGRAW

INTERIOR BOARD OF CONTRACT APPEALS

The Government has moved to remand the instant appeal to the contracting officer for his decision or other disposition on the ground that the appeal is premature. In support of its position the Government points to the fact that the contracting officer's letter from which the appeal was taken did not include the terminal paragraph prescribed by regulation in which the contractor is advised of the finality of the decision and of its right of appeal. The principal argument advanced by the Government, however, is that quoted below:

> 3. * * * The matters covered in the contractor's notice of appeal bear no relationship to the contents of the July 11, 1975 Contracting Officer letter. The notice of appeal * * * alleges additional work beyond the scope of the contract which the contractor claims he was required to perform, whereas the July 11, 1975 letter does not even address itself to that question. It is concerned, rather, with allowability of costs under Modification No. 3[1] to the contract. Thus, no findings of fact and decision by the Contracting Officer of the matters covered by the notice of appeal has been made. *Appeal of Production Tool Corp.*, IBCA–262 (April 17, 1961), 61–1 BCA par. 3007.

The motion also states that the claims covered by the notice of appeal are still being considered by the contracting officer and that since the appeal was filed, two meetings between the contracting officer and

[1] Apropos of this contracting officer's letter of July 11, 1975, states: "Furthermore, in accordance with Modification No. 3 to the contract which stated in part '2. Notwithstanding the provisions of Clause 31(a)(1) of the contract entitled *"Allowable Cost Fixed Fee, and Payment,"* the maximum *cost* allowable under subject contract shall not exceed $69,799,' your invoice number 2639 is being returned herewith without action."

the contractor have been held to discuss the claims and additional meetings are either scheduled or contemplated by the parties.

Opposing the Government's Motion to remand the appeal as premature, appellant's counsel submits that the contracting officer's letter of July 11, 1975, is indeed a final decision and therefore appealable. Advanced in support of the position are the following arguments: (i) Appellant's claim for $51,681.99 [2] as set forth in Invoice No. 2639 was in effect denied by the contracting officer under the authority of contract provisions deemed relevant by him (see note 1, *supra*); (ii) the appeal in this case was timely filed and hence is not governed by the cases cited by the Government; (iii) the alleged failure of the letter to bear a significant relationship with the notice of appeal overlooks the fact that "communications concerning the work performed under invoice number 2639 were held with an immediate subordinate of the Contracting Officer at the time the issue concerning performance of this work arose" and that the knowledge so gained "on the part of the Contracting Officer and/or his staff of the facts and circumstances upon which this appeal is based" make unsupportable the contention that the contracting officer did not intend to make a final decision [3]; (iv) the holding of meetings with the contracting officer and at his request in an effort to amicably resolve the dispute should not be deemed to invalidate the finality of the contracting officer's letter or jeopardize the appellant's position.

In passing upon the disparate contentions of the parties, we are without the documents includible in the appeal file.[4] The notice of appeal was accompanied by a number of documents, however, including a copy of the contract here in issue. A review of the contract discloses that it was a negotiated cost-plus-fixed fee type with an estimated cost of $69,799 and a fixed fee of 6,980, resulting in a total estimated amount of contract of $76,779. The request for proposal and the resulting contract called for the "Preparation of an Environmental Impact Analysis for Proposed Emery Generating Station, Emery County, Utah." [5]

[2] The entire amount claimed is in excess of the total estimated cost and fixed fee as established in the contract. Concerning these the letter of July 11, 1975 (note 1, *supra*), states: "This letter shall serve to inform you that a final audit of your Contract No. 52500–CT5–1005 has been performed and report of such received by this office. Subject audit has verified that VTN did incur allowable costs in the amount of $69,799. The fixed-fee is established at $6,980 for a total amount of $76,799. Accordingly, your final invoice number 2638 in the above amount has been approved for payment as of this date."

[3] Motion In Opposition to Government's Motion to Remand, par. 3.

[4] In the Motion to Remand the Government requests that proceedings be stayed pending the Board's ruling on the motion. Since the Government's motion is being granted, there is no need for the contracting officer to proceed with the assembly and transmission of the appeal file documents until after a new finding has been issued and a timely appeal taken therefrom.

[5] See page 2 of the contract (Standard Form 36, July 1966), Continuation Sheet.

The contract was prepared on Standard Form 26 (July 1966), and included the General Provisions set forth in Standard Form 32 (November 1969 Edition) and Additional General Provisions Supply Contract among which were Clause 30, LIMITATION OF COST (FPR 1–7–202–3(a)) and Clause 31, ALLOWABLE COST, FIXED-FEE, AND PAYMENT (FPR 1–7–202–4).

Invoice No. 2639 is in the amount of $51,681.99. The entire sum is in excess of the estimated cost specified in the contract. (See notes 1 and 2, *supra.*) Insofar as the record before us discloses, the documentation submitted to the contracting officer in support of the additional payment claimed of $51,681.99 consisted of the summary entries on the invoice itself and two back-up sheets showing the contractor personnel involved and the amounts charged for direct labor in three different endeavors for the months in question ($23,119.36), together with the amount of overhead claimed ($27,974.43) and an itemization of direct expenses ($588.20).

There is nothing to indicate that any written statement accompanied the invoice or that the contracting officer was otherwise advised of the basis for considering the Government liable in the amount stated. Apparently appellant's counsel hopes to supply this lack by asserting that "communications concerning the work performed under invoice number 2639 were held with an immediate subordinate of the Contracting Officer at the time the issue concerning performance of this work arose" and by charging "knowledge on the part of the Contracting Officer and/or his staff of the facts and circumstances upon which this appeal is based." We note, however: (i) that copies of the "communications" to which reference is made did not accompany the Opposition filed by appellant's counsel; (ii) that the "communications" are not otherwise identified; and (iii) that the gist of these "communications" is nowhere indicated. Unanswered questions include whether the communications to or from the "immediate subordinate of the Contracting Officer" revealed an awareness on the subordinate's part that the contractor considered the work to be beyond the scope of its obligations under the contract. Another question not susceptible to an answer from the material before us is what is the specific nature of the knowledge sought to be imputed to the contracting officer or members of his staff concerning the facts and circumstances upon which the appeal is based and the time frame within which it is contended such knowledge was imputable.

Decision

[1] There is no question here as to whether the instant appeal was timely filed. The cases cited by the Government in which timeliness

of the appeal was in issue[6] are therefore not dispositive of the question before us. That is, whether, absent any question of timeliness, the appeal should be remanded to the contracting officer for new or supplemental findings.

[2] We have consistently adhered to the view that our jurisdiction is appellate in nature and that we may not consider claims presented for the first time in the notice of appeal or in the documents filed thereafter. *A. S. Wikstrom, Inc.*, IBCA–466–11–64 (March 23, 1965), 65–1 BCA par. 4725; *Franklin W. Peters and Associates*, IBCA–762–1–69 (December 28, 1970), 77 I.D. 213, 71–1 BCA par. 8615; and *Baldi Construction Engineering, Inc.*, IBCA–679–10–67 (April 9, 1970), 77 I.D. 57, 70–1 BCA par. 8230.

Because of the limitations imposed by the appellate nature of our jurisdiction,[7] we have ordinarily remanded such cases to the contracting officer. *Baldi Construction Engineering, Inc., supra; Divide Construction Co.*, IBCA–402 (September 27, 1963), 1963 BCA par. 3877; *McGraw-Edison Co.*, IBCA–699–2–68 (October 28, 1968), 75 I.D. 350, 353, 68–2 BCA par. 7335 at 34,110–111 (stay in proceedings granted pending the issuance of findings and taking of appeal where such action would facilitate the orderly presentation and consideration of the claims involved). *Cf. American Cement Corp.*, IBCA–496–6–65 (January 6, 1966), 65–2 BCA par. 5303 (Government motion for stay in proceedings, or, in the alternative, to remand the matter to the contracting officer denied where there was reason to doubt that the contractor would appeal to the Board from findings issued on claims then pending before the Court of Claims).

Turning to the case before us, we find that Invoice No. 2639 and the accompanying documents were wholly inadequate as notice to the contracting officer of the basis for the claims now asserted. In this connection, the Government concedes that the notice of appeal alleges that the contractor was required to perform additional work beyond the scope of the contract. A

[6] *E.g., McLinn Construction Co.*, IBCA–369 (July 24, 1963), 1963 BCA par. 3798 at 18,917 ("In order for a decision or findings of fact to start running the time of appeal, 'it must at least, fairly and reasonably inform the contractor that a determination under the "disputes" clause is intended.' The decision must comply with agency directives and include a 'caveat' to the contractor 'to put appellant on notice that he must appeal in the event of disagreement.' * * *" (citations omitted.)

See also *Staff Associates, Inc.*, ASBCA No. 19362 (July 28, 1975), 75–2 BCA par. 11,404 ("* * * the failure of a contracting officer to follow the format of ASPR 1–314 in issuing a final decision, is not a bar to our jurisdiction over a timely appeal from that decision. The significance of a 'final' decision is to preclude late appeals, not timely ones.").

[7] See *Merritt-Chapman & Scott Corp.*, IBCA–257 (June 22, 1961), 68 I.D. 164, 167, 61–1 BCA par. 3064 at 15,852 ("The claim as now framed is not an appropriate one for determination in this appeal, since it was never presented ot the contracting officer for decision. There is nothing in the original claim documents to apprise the contracting officer that the claim was for the making of an equitable adjustment pursuant to an alleged constructive change order. Accordingly, the indispensable ingredients for exercise of the Board's appellate jurisdiction are lacking as to the alleged constructive change order.").

claim so framed is clearly cognizable under the contract as a constructive change and entitled to consideration on the merits if otherwise in order. In any event, it is clearly the prerogative of the contracting officer to determine in the first instance whether and, if so, to what extent the claims now asserted are meritorious. *Merritt-Chapman & Scott Corp.* (note 7, *supra*); *Divide Construction Co., supra; McGraw-Edison Co., supra. Cf. James C. Gruber*, ASBCA No. 10568 (October 22, 1965), 65-2 BCA par. 5159.

Accordingly, the Government's motion is granted. The instant appeal is remanded to the contracting officer for the issuance of appropriate findings of fact and decision [8] or for such other disposition as may be acceptable to the parties.[9] Should new or supplemental findings be issued, the contractor may, if aggrieved, again appeal to this Board within 30 days from the date of receipt thereof.

WILLIAM F. MCGRAW,
Chief Administrative Judge.

I CONCUR:

SPENCER T. NISSEN,
Administrative Judge.

[8] The findings may be made either on the basis of the records presently available or as augmented by such additional data as may be developed.

[9] In view of the meetings that have already been held on the alleged constructive changes, there would appear to be no warrant for not promptly bringing the matter to a conclusion whichever course of action is pursued.

ESTATE OF JOHNNIE HOLMES

4 IBIA 175

Decided *October 31, 1975*

Petition to reopen.

Denied.

1. Indian Probate: Reopening: Generally—375.0

In the absence of a showing that a manifest injustice is possible if a case closed for more than 3 years is not reopened, a petition for reopening will not be allowed.

2. Indian Probate: Reopening: Generally—375.0

When the evidence before the examiner was uncontradicted as to the factual determination of marriage, and a request for reopening exceeds by 22 years an uncontested determination of heirship, the usual reluctance to avoid disturbance of a fact-finder's decision takes on greater emphasis.

3. Indian Probate: Evidence: Presumptions—225.5—Indian Probate: Evidence: Proof of Marriage—225.7

Although the marriage provisions of a law and order code may be interpreted as recognizing as valid only marriages accomplished by licensing and ceremony, there is a strong public policy favoring marriage which advises that a marriage should be presumed valid unless disproved. This presumption has been extended to marriage by Indian custom.

4. Indian Probate: Marriage: Proof of Marriage—325.6

Where a law and order code contains no express provision nullifying an Indian custom marriage and where state law affirmatively recognizes such marriage, an uncontested determination of heirship handed down two decades ago which is

consistent with state law respecting valid marriages, ought not be disturbed.

5. Indian Probate: Reopening: Generally—375.0

Even if petitioners were entitled to their requested relief, which is unsupported by the record, an untimely petition can be denied—even for a petitioner who was not given an opportunity to be heard in the original proceeding.

APPEARANCES: Callis A. Caldwell, Attorney for Jerry Humpy and Elaine H. Browning.

OPINION BY ADMINISTRATIVE JUDGE HORTON

INTERIOR BOARD OF INDIAN APPEALS

This matter comes before the Board upon a petition for reopening of probate filed by Callis A. Caldwell, Esq., for and in behalf of Jerry Humpy and Elaine H. Browning, pursuant to 43 CFR 4.242.

The petition for reopening was filed February 21, 1975. A final decision probating the estate at issue was entered January 19, 1953. Accordingly, the petition was forwarded to the Board by Administrative Law Judge William E. Hammett as authorized by 43 CFR 2.242(h) "[i]f a petition for reopening is filed more than 3 years after the entry of a final decision in a probate * * *."

The Administrative Law Judge recommended against reopening this case in his forwarding statement dated February 25, 1975. For the reasons set forth herein, the Board concurs with the recommendation that the petition to reopen be denied.

The petitioners allege they are entitled to a greater share of the estate previously probated in the will of Johnnie Holmes, Fort Hall Allottee No. 1077, whose trust property was devised in an approved will naming Elizabeth Humphrey of Owyhee, Nevada (a/k/a Elizabeth Humpy and Elizabeth Dodge), as sole beneficiary. Elizabeth Humphrey died shortly after the testator and before the hearing of June 4, 1952, determining the lawful inheritors of Holmes' property. Since Elizabeth Humphrey died intestate, the above hearing involved an inquiry into her marital status and the identity of lineal descendants.

In an Order Approving Will and Determining Heirs of Subsequently Deceased Devisee, entered January 19, 1953, the Examiner of Inheritance determined that at the time of her death Elizabeth Humphrey was survived by a spouse, Johnnie Dodge, two sons, Jim and Harold Humpy, and two daughters, Amelia Humpy, who died prior to the June 4, 1952, hearing, and Elaine H. Browning, one of the petitioners. In accordance with Idaho law, where the trust property was situated, each of the four children was awarded a one-sixth share in the estate of the deceased-devisee and the surviving spouse obtained a two-sixths share. The other petitioner in the case at hand, Jerry Humpy, is a grandson

of Elizabeth Humphrey and the son of Amelia Humpy, named above.

Petitioners, Jerry Humpy and Elaine Browning, Shoeshone Indians, claim that the initial order determining heirs of Elizabeth Humphrey in the probate of the Johnnie Holmes estate erroneously concluded that Elizabeth Humphrey was the wife of Johnnie Dodge. It is their request, therefore, that the case be reopened for a new factual determination.

At the outset, it is apparent that Elaine H. Browning lacks standing to petition the Board for reopening. Her affidavit in support of the petition, and the transcript of hearing, indicate her appearance at the June 4, 1952, hearing. Accordingly, whatever direct information she possesses regarding the relationship between Johnnie Dodge and Elizabeth Humphrey could have been presented at the time of her prior testimony. Elaine Browning's affidavit attached to the petition states that, because of her poor English, she did not really know what was going on at the hearing in question. The transcript reflects, however, that a Shoshone interpreter was present at the hearing in addition to her English-speaking brother, Jim Humpy.

With respect to the merits of the charge now brought by the petitioners, the Board is understandably inclined to favor testimony preserved at the hearing over evidentiary challenges raised more than 22 years after the issue was examined. In this regard, the sworn testimony of Jim Humpy, one of Elizabeth Humphrey's two sons who resided in Owyhee, Nevada, at the time of her death, indicates his clear-cut assessment that Elizabeth Humphrey and Johnnie Dodge were husband and wife and that they had married "the Indian way" (Tr. p. 2). It is also significant that in the only testimony provided by petitioner Elaine Browning at the hearing, she advised the Examiner to talk to her brother, Jim Humpy, because he "knows more" (Tr. p. 1). Elaine Browning's residence at the time of her mother's death was Pocatello, Idaho.

Petitioner Jerry Humpy, who alleges he was in California at the time of the June 4, 1952, hearing and had no actual notice of the proceeding, urges reopening on the grounds that as a youth, he lived with his grandmother, Elizabeth Humphrey, and that, in his opinion, Johnnie Dodge was only a frequent overnight guest at his grandmother's home and not her husband.

[1] In the absence of a showing that a manifest injustice is possible if a case closed for more than 3 years is not reopened, a petition for reopening will not be allowed. 43 CFR 2.242(h); *Estate of Sophie Iron Beaver Fisherman (Cheyenne River No. 2335, Deceased)*, 2 IBIA 83, 80 I.D. 665 (1973).

[2] When the evidence before the Examiner was uncontradicted as to the factual determination of marriage, and a request for reopening exceeds by 22 years an uncontested

determination of heirship, the usual reluctance to avoid disturbance of a factfinder's decision takes on greater emphasis. *See Estates of Teddy Punlay and Haw-wau-na-ha-sun-ah*, IA–8 (October 6, 1949, and April 7, 1950) in which a petition to reopen on grounds a marriage was erroneously established was denied where the petition was not filed for 35 years and the moving party acquiesced during this period in the original finding.

Here, the petitioners submit a further challenge to the standing order affecting this estate by alleging that Indian-custom marriages are not recognized in Owyhee, Nevada, and that the records show no evidence of a marriage license.

The Board has been provided a copy of the pertinent sections of the law and order code followed from 1950–53 by the Duck Valley Tribal Court. Section 1, Chapter 3 of this code, which deals with domestic relations, provides that "[a]ll Indian marriages and divorces, whether consummated in accordance with the State law or in accordance with tribal custom, shall be recorded within three months at the Western Shoshone Agency." Section 2, Chapter 3 directs, in pertinent part, that all marriages shall be on authority of licenses and that a ceremony shall be performed, in the case of tribal licenses, by the Judge of the Shoshone-Paiute Indian Court.

[3] Although the marriage provisions of a law and order code may be interpreted as recognizing as valid only marriages accomplished by licensing and ceremony, there is a strong public policy favoring marriage which advises that a marriage should be presumed valid unless disproved. See 35 Am. Jur. Marriage, Sec. 3, p. 181. This presumption has been extended to marriage by Indian custom. *Chancey* v. *Whinnery*, 47 Okl. 272, 147 P. 1036 (1915).

In Nevada, where Elizabeth Humphrey and Johnnie Dodge were domiciled, state courts since 1896 have upheld the validity of common-law marriages, including marriages by Indian custom, even where the law required certain formal preliminaries found not to be complied with, on grounds that the statute or law in question contained no express clause of nullity. *State* v. *Zichfeld*, 23 Nev. 304, 46 P. 802 (1896); *Ponina* v. *Leland*, 185 Nev. 263, 454 P. 2d 16 (1969).

It is not considered necessary in disfavoring this petition to determine whether the law and order code of the Western Shoshone Indians nullifies an otherwise traditional Indian-custom marriage. The code would seem susceptible to varying interpretations. Instead, the overriding consideration in the review of this petition centers on the legal and practical obstacles to disturbing an Examiner's finding rendered over 22 years ago which was supported by uncontradicted testimony.

[4] Thus, where a law and order code contains no express provision nullifying an Indian-custom marriage and where state law affirmatively recognizes such marriage, an uncontested determination of heirship handed down two decades ago

which is consistent with state law respecting valid marriages, ought not be disturbed.

[5] Further, even if petitioners were entitled to their requested relief, which is unsupported by the record, an untimely petition can be denied—even for a petitioner who was not given an opportunity to be heard in the original proceeding. *Estate of Ke-i-ze or Julian Sandoval (Navajo Allottee No. 12253, Deceased)*, 4 IBIA 115 82ID.402 1975). When applied, this strict rule is founded upon the two-fold consideration that 1) the public interest is served by leaving undisturbed Indian probate decisions of long standing, and, hence, the stability of title, 2) the doctrine that nondiligent actions should not be rewarded.

Whether the above rule presents additional grounds in this action for disallowing the petitioners' request is contingent on whether a manifest injustice would be possible if their petition is denied. Here it is assertable that a manifest injustice could be presumed if there is no reasonable basis for concluding that Johnnie Dodge was married to Elizabeth Humphrey. Such is clearly not the case. Moreover, an injustice might be done by permitting a belated attack on the form or fact of marriage previously established, particularly when the disputed husband is no longer living.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Petition to Reopen filed by Jerry Humpy and Elaine H. Browning be, and the same is hereby, DENIED.

This decision is final for the Department.

WM. PHILIP HORTON,
Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

CHARLES T. SINK

5 IBMA 217

Decided *October 31, 1975*

Appeal by Charles T. Sink from a decision by Administrative Law Judge Joseph B. Kennedy declaring the applicant's coal mine subject to the Federal Coal Mine Health and Safety Act of 1969 in a proceeding brought pursuant to section 105(a) of the Act.

Affirmed in result.

1. Federal Coal Mine Health and Safety Act of 1969: Generally—Federal Coal Mine Health and Safety Act of 1969: Mines Subject to the Act

In an underground coal mine owned and operated by two partners who are also the only miners in such mine, there being no employees, such owner-operators and the mine are, nevertheless, subject to the provisions of the Act, where the coal extracted from such mine enters commerce by being transported interstate.

APPEARANCES: William W. Talbott, Esq., for appellant, Charles T. Sink; John M. Allen, Deputy Associate Solicitor, and Robert J. Phares, Trial Attorney for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This appeal raises the issue of whether the subject coal mine falls within the scope of section 4 of the Federal Coal Mine Health and Safety Act of 1969 (the Act) and is thus subject to the provisions thereof. 30 U.S.C. § 803 (1970). The Administrative Law Judge (Judge) rendered his decision in this case on May 19, 1975, based upon a joint motion for summary decision and waiver of an evidentiary hearing together with a written stipulation of facts containing a statement of issues presented in the administrative proceeding. The Judge concluded that "small, owner-operated coal mines are covered by and subject to the provisions of the Act" and that coal produced by the Sink Mine is regularly sold through interstate means and enters the stream or flow of interstate commerce within the meaning of sections 3(b) and 4 of the Act. 30 U.S.C. §§ 802(b) and 803. Whereupon, he declared that the Secretary of the Interior acting through the Mining Enforcement and Safety Administration (MESA) has the power and authority under the Act to regulate health and safety practices in the Sink Mine and denied the Application for Review without prejudice to the operator's right to challenge the validity of the section 104(c) notices and orders on other grounds in any subsequent penalty proceeding. In his appeal to the Board, appellant Charles T. Sink (Sink) argues in substance that the history and language of the Act show that Congress did *not* intend that an owner-operated coal mine with no employees be covered by the Act. He also argues that the subject coal mine does not, in fact, have any substantial effect on interstate commerce. For reasons cited below, we affirm the Judge's denial of Sink's Application for Review.

Procedural and Factual Background

On November 5, 1974, James R. Elkins, a duly authorized inspector of MESA, conducted an inspection of the Charles T. Sink Mine located near Boggs, West Virginia, and owned and operated by Sink in partnership with his son, Bill. No other persons work in the Sink Mine. The parties, *inter alia*, stipulated to the following facts: that the entire production of the Sink Mine from September 1973 to November 1974 was 2,947 tons; and that between June 1 and November 4, 1974, Sink sold 738 tons or approximately twenty-five percent (25%) of the coal produced in the Sink Mine to Courtney Foos who delivered it to customers located in the State of Pennsylvania, the total value of the amount shipped being approximately $40,000.

As a result of the November 5 inspection, the inspector issued one notice of violation and four orders of withdrawal pursuant to section 104(c) of the Act, 30 U.S.C. § 814 (c) (1970).

On December 5, 1974, the United States District Court for the Southern District of West Virginia issued an injunction [1] enjoining the

[1] *Charles T. Sink* v. *Morton*, Civil Action No. 74-495-CH.

Secretary of the Interior from enforcing said notice and orders until such time as an administrative determination of the issues involved was made pursuant to the provisions of the Act.

The Judge's decision was issued on May 19, 1975, and appealed by Sink on June 9, 1975. The notice of appeal included a request for Temporary Relief. On June 23, 1975, the Board dismissed the application for temporary relief as unnecessary since the District Court's Memorandum Order of December 5, 1974, had already enjoined the Secretary from enforcing the notice and orders until a final administrative determination of the issues herein raised on appeal.

Sink filed a Memorandum and Brief in support of his appeal on June 30, 1975. The Mining Enforcement and Safety Administration (MESA) filed a reply brief on July 11, 1975.

On October 6, 1975, Sink filed a petition for temporary injunction in which he advised the Board that the injunction issued by the U.S. District Court was vacated by the U.S. Court of Appeals for the Fourth Circuit on October 1, 1975.

Contentions of the Parties

Both parties cite section 4 of the Act as the provision central to this case. It reads in pertinent part:

MINES SUBJECT TO ACT

Sec. 4. Each coal mine, the products of which enter commerce, or the operations or products of which affect commerce * * * shall be subject to the provisions of this Act.

30 U.S.C. § 803 (1970).

Sink argues in substance 1) that the history and language of the Act exempts one-man, owner-operated coal mines, and 2) that his coal mine does not, in fact, fall within the classification of a coal mine pursuant to section 4 of the Act. In support of the first contention, Sink alleges that the Act's language contains requirements which cannot be met by an operator who mines his own coal (Br. 5–8). In support of the latter, Sink relies upon *Morton* v. *Bloom*, 373 F. Supp. 797 (W.D. Pa. 1973), in which a Federal District Court found that all of the coal produced from the particular owner-operated mine was sold exclusively within Pennsylvania, the state of the mine's situs. That Court employed the test of whether the operator's coal or his operations "affected commerce" and decided in the negative. Although Sink concedes the fact that 25 percent of his production was sold to a broker in West Virginia who then sold it to Pennsylvania consumers, he contends that the transaction with the broker was intrastate as well as intracounty, that he had no knowledge of the destination of this coal at the time of its sale to the broker, and that this small percentage did not substantially affect commerce as contemplated by section 4 of the Act. His brief states in pertinent part:

All sales of Sink's coal took place not only intrastate but also intracounty. Sink plainly stated he would not attest to what happened to the coal after it

was sold by him * * * a very small percentage of the coal was carried out of the state by Courtney Foos. The point, however, to keep in mind is that the sale to Foos, as well as all other sales, were (sic) intrastate as well as intracounty. * * * Could one say that such an intrastate sale by Sink to Foos, who admits in his letter he sold to his Pennsylvania customers, be considered as an intrastate sale by Sink * * *. (Br. 12–20.)

In its reply brief, MESA contends that the legislative history does not impute a narrow application of the Act's scope, but requires a broad application as evidenced by the elimination of the distinction between gassy and nongassy mines. It further contends that impossibility of compliance with some of the Act's provisions by the owner-miner does not mean that Congress did not intend the Act to apply to owner-operated mines. Finally, it argues that Sink's application of the *Bloom* decision, the issue of which focused solely on whether that particular mine's products *affected* commerce, is inapposite as a coal mine may fall within the purview of the Act if its products *enter* commerce as did 25 percent of Sink's coal production.

Issue Presented on Appeal

Whether the Administrative Law Judge erred in concluding that the Charles T. Sink No. 1 Mine is subject to the provisions of the Federal Coal Mine Health and Safety Act of 1969.

Discussion

Addressing the phrase in section 4 of the Act, *viz.*, "* * * each operator * * * and every miner * * * shall be subject to the provisions of this Act," the Board is certainly cognizant of the apparent inconsistency inherent therein when applied to a coal mine owned and worked by the same individual. Nevertheless, for reasons hereinafter cited, and as harsh as it may appear at times, we must conclude that Congress manifested no intent to exclude any operating coal mine from the Act solely on the basis of size or number of employees, or on the basis of having no employees.

The historical background and the legislative history of coal mine health and safety laws support this view. In 1952 the predecessor of the current Act, titled the Federal Coal Mine Safety Act, July 16, 1952 (66 Stat. 692), was signed by President Truman with great reluctance as he criticized, *inter alia*, the fact that it exempted mines employing 14 miners or less.[2] In 1966 this exception was explicitly deleted with the passage of the Federal Coal Mine Safety Act Amendments of 1965, March 26, 1966 (80 Stat. 84).[3] Not only are numbers no longer an index to ascribing an exempt status to a small mine, but also the distinction of a gassy, vis-a-vis, a nongassy mine. The Act purports to provide the means "to improve the health and safety conditions and practices at *all underground coal mines*" [4]

[2] *Legislative History, Federal Coal Mine Health and Safety Act*, House Comm. on Education and Labor, 91st Cong., 2d Sess., at 5 (S. Rep. No. 91–411) (Comm. Print, 1970) (hereinafter *Leg. Hist.*).

[3] *Leg. Hist.* at 6. Addressing this issue, Senator Jennings Randolph, Chairman of the Senate Committee on Public Works, spelled out the intent of the 1966 Amendment as "to extend the Coal Mine Safety Act provisions to the smaller mines to protect *all* miners." (Italics added) *Leg. Hist.* at 212.

[4] *Leg. Hist.* at 115.

and, as a testament thereof, the House Committee on Education and Labor rejected an amendment proposed by Senator Cooper (Ky.) that would have permitted the use of nonpermissible equipment in nongrassy mines.[5] Finally, the United States Court of Appeals for the Fourth Circuit in *Reliable Coal Corporation* v. *Morton*, 478 F. 2d 257 (4th Cir. 1973), plainly stated that the Act's history "* * * demonstrates beyond any doubt that Congress carefully evaluated the issue and determined that the gassy/nongassy distinction should be eliminated * * *."

Section 2(g)(2) of the Act reads:

> Sec. 2. Congress declares that—
> (g) it is the purpose of this Act * * * (2) to require that each operator of a coal mine and every miner in such mine comply with * * * [mandatory health or safety] standards; * * *.

30 U.S.C. § 801(g)(2) (1970).

Section 3(g) of the Act defines "miner" as "any individual working in a coal mine." 30 U.S.C. § 802(g) (1970). We find that Sink is an "individual working in a coal mine" and is thus a "miner" for purposes of section 3(g). As owner of the subject coal mine, Sink is also the "operator" thereof pursuant to section 3(d). 30 U.S.C. § 802(d) (1970). The Board is of the opinion that the fact that an individual is both a miner and operator does not exempt that individual from the purview of section 2 of the Act. Furthermore, section 2(b) of the Act evidences a concern by Congress not only for the miners but for the "grief and suffering * * * to their families." Accordingly, we conclude that the intent of the Federal Coal Mine Health and Safety Act as manifested in the legislative history and language of the Act is to be broadly construed to apply its provisions to an owner-operated coal mine.

Sink's reliance upon the Board's decision in *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973) as support for an exemption for an owner-operator mine, because of impossibility of compliance with all of the provisions of the Act, is misplaced. *Buffalo* did not involve an owner-operator mine, did not apply to exemptions and held only that Congress did not intend a violation to be charged where compliance was impossible due to *unavailability of equipment, materials or qualified technicians.*

[1] Sink's second and major argument circumvents the first and primary classification of section 4 subjecting a mine to the provisions of the Act if its products *enter* commerce. In analyzing section 4, the Board concludes that Congress intended the "enter commerce" and "affect commerce" clauses to be alternatives either of which subjects a mine to the provisions of the Act. Sink in this respect bases his argument for exempt status solely on the *Bloom* decision, discussing at some length reasons why the coal produced from his mine does *not* substantially *affect* commerce. Having carefully read Sink's brief, the Board finds that he has not demon-

[5] *Leg. Hist.* at 35.

strated in any meaningful way that coal produced from his mine did *not enter* commerce and that the facts are to the contrary. The instant case on its facts is distinguishable from the *Bloom* decision, the facts of which clearly evidenced coal sold and consumed totally intrastate, thus limiting the issue to whether that mine's product or operation affected commerce. We note that the matter of determining if a mine's coal or operation substantially affects commerce takes into consideration many variables, whereas determining if a mine's coal enters commerce is resolved by the single proof of its entry. The Board notes the parties' stipulation that between September 1973, and November 1974, approximately 25 percent of Sink's coal was sold to Courtney Foos who then sold it to Pennsylvania customers. The Foos' transaction accounted for $40,000 of Sink's income realized between those months. The fact that title to the coal passed to Foos before the coal crossed the West Virginia state line did not make Sink's operation any less a part of interstate commerce.[6] His production of coal which later entered interstate commerce represented one part of the mainstream of economic activity leading to the coal's out-of-state sale.[7] In summary, based upon the foregoing facts, the Board finds that Sink's No. 1 Mine did produce coal that entered the stream of commerce and, accordingly, is subject to the provisions of the Act.

The Board sees no reason to undertake a hearing of Sink's pending motion for temporary relief, since we are making a final decision of this proceeding on its merits before such motion, as a practical matter, could be properly determined.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Application for Temporary Relief IS DENIED, and that the Judge's decision IS AFFIRMED.

HOWARD J. SCHELLENBERG, Jr.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

[6] In *NLRB* v. *Fainblatt*, 306 U.S. 601, 602–603 (1939), the Supreme Court held that transportation across state lines is commerce regardless of whether title to the merchandise passes before or after such transportation.

It also appears the Supreme Court has put to rest the issue of whether there must be circumstances demonstrating with certainty an out-of-state destination of goods in order to constitute a sale in interstate commerce. In *Campbell* v. *Hussey*, 368 U.S. 297, 298–299 (1961), *reh. den.*, 368 U.S. 1005 (1962), it was held that Congress could provide for inspection of tobacco prior to auction sales even though it is not known at the moment of sale whether it is destined for interstate or intrastate commerce.

[7] Like the purpose of the Federal Coal Mine Health and Safety Act, the primary objective of the Fair Labor Standards Act articulated in *U.S.* v. *Darby*, 312 U.S. 100 (1941) aimed to establish minimum standards insuring the health and safety of employees, and the introduction of their product into interstate commerce was the means by which Congress asserted its regulatory power over their employers.

U.S. GOVERNMENT PRINTING OFFICE: 1975

ESTATE OF PHILLIP TOOISGAH

4 IBIA 189

Decided *November 13, 1975*

Appeal from an administrative law judge's order denying petition for rehearing and from order modifying decision.

Affirmed in part; vacated in part; and remanded.

1. Indian Probate: Marriage: Proof of Marriage—325.6

As between two alleged common-law marriages, the law favors the most recent in time over a relationship between two who formerly were married.

2. Indian Probate: Trust Property: Generally—415.0

Judgments entered against allottees of restricted land are voidable.

3. Indian Probate: Trust Property: Generally—415.0

Despite strict laws prohibiting the alienation and encumbrance of restricted land, the Secretary has authority to approve an agreement made by an allottee for the disposition of oil income from restricted property.

APPEARANCES: Houston Bus Hill for appellants; Red Ivy for appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

A petition for rehearing in the Estate of Phillip Tooisgah, Ft. Sill Apache and Apache Unallottee, brought by Velma Tooisgah, alleged spouse of the decedent, and Jonathan Tooisgah, decedent's son, was denied by order of the Administrative Law Judge, John F. Curran, on January 3, 1975. On the same date, Judge Curran entered an order modifying his July 19, 1974, decision by disallowing Velma Tooisgah any distribution rights in the estate of the decedent. An appeal of these orders was timely filed on March 21, 1975. The issues have been briefed by the parties and the extensive record on appeal has been carefully reviewed by the Board. For the reasons set forth in this opinion, Judge Curran's order denying appellants a rehearing in this matter shall be affirmed as to the determination of the decedent's legal widow; the order granting the appellee, Clara Walker Tooisgah, her requested relief from a petition for rehearing is vacated and the cause remanded.

The Administrative Law Judge entered a Memorandum Decision and Order Determining Heirs on July 19, 1974, as modified January 3, 1975, in which Clara Walker Tooisgah, a/k/a Clara Walker, was adjudged the surviving wife of the decedent and, according to Oklahoma law, entitled to a one-half interest in the probated estate, the other one-half to be inherited by Jonathan Tooisgah, the decedent's only son. The evidence which led to this determination was adduced from an original and two supple-

mental hearings and from testimony incorporated from probate proceedings conducted in state court.[1]

Specific determinations dispositive of this appeal include the following: that Phillip Tooisgah, who died intestate on February 10, 1971, was survived by a common-law wife named Clara Walker Tooisgah, appellee,[2] in addition to one son, Johnathan Tooisgah, appellant; that Velma Tooisgah, appellant, was formerly married to Phillip Tooisgah, first by common-law and then by civil ceremony on September 23, 1940, but that this marriage was terminated by a valid divorce obtained in state court on September 19, 1969; that irrespective of evidence that Phillip and Velma cohabited together subsequent to their divorce, neither a common-law marriage nor a reinstatement of their first marriage occurred; that irrespective of evidence that Phillip and Clara cohabited together and otherwise projected themselves as husband and wife within six months from the date of the decedent's divorce from Velma, their common-law relationship continued after such period and until Phillip's death in 1971, thereby satisfying legal requirements to support a common-law marriage;[3] that Clara Walker Tooisgah was not the common-law wife of Jess Copley at the time of her relationship with the decedent and therefore possessed full capacity to marry.

Without the benefit of personal observation of the more than 20 witnesses who testified in this matter, a factor which influenced the Administrative Law Judge in favor of the appellee (Memorandum Op., p. 3), the transcript of proceedings persuasively conveys that Phillip Tooisgah and Clara Walker established a valid common-law marriage which remained in effect until Phillip's death. The evidence shows, *inter alia*, that Phillip gave Clara an engagement and wedding ring following his divorce from Velma (Tr. 27, 63). The decedent opened a charge account for Clara as his wife (Tr. 114). Phillip and Clara borrowed money from the bank as husband and wife and jointly signed notes of indebtedness (Tr. 36). A motor vehicle title was held in their joint names (Tr. 93). The decedent introduced Clara to people as his wife (Tr. 26, 32, 42). The decedent and Clara traveled extensively together, registering in motels as husband and wife and visiting relatives

[1] The district court judge of Caddo County, Oklahoma, determined that Clara Walker Tooisgah was the surviving widow of the decedent in a finding made May 29, 1974.

[2] The record shows Phillip and Clara were married in a civil ceremony as early as 1940 or 1941 but that this marriage was annulled the same year.

[3] Appellants contend the Administrative Law Judge erred "in his conclusion that Phillip had the legal capacity to enter into a common-law marriage during the six-month period after the divorce" (Item 8, Appellants' Grounds for Appeal and Brief in Support of Appeal, p. 10). The Administrative Law Judge did not so rule. To the contrary, Judge Curran's opinion states at page 3:

"Title 12, Section 1280, Oklahoma Statutes, 1971, provides that it shall be unlawful for a party to a divorce action to marry another person within a period of six months from the date of the divorce decree. Thus, the entry into the common-law relationship immediately after the divorce was unlawful."

as husband and wife (Tr. 64, 110). Phillip and Clara lived together from September 1969, until the decedent's death, February 10, 1971 (Tr. 10). Throughout the above period, Phillip and Clara were commonly known to be husband and wife in the community at large (Tr. 31, 36, 42, 50, 114).[4]

In contrast, an unconvincing scenario was presented by the appellants that Velma and Phillip Tooisgah had disavowed the divorce decreed by a state court in 1969 and that they had lived as man and wife until Phillip's death. However, the overwhelming evidence that Clara Walker, not Velma, was publicly seen with Phillip Tooisgah from September 1969, until February 1971, among the other compelling indicia of a marital relationship between Clara and the decedent previously noted, casts too strong a doubt on the credibility of the appellants' claim that Velma stayed married to Phillip after 1969, or that, in the alternative, Phillip had no wife at the time of his death.

[1] Appellants press a claim that the law favors a finding of a common-law marriage "between persons who were previously married to each other, then were divorced, and then began living together again" (Brief in Support of Appeal, p. 2). An Oklahoma Supreme Court case, *Thomas* v. *James*, 69 Okla. 285, 171 P. 855 (1918), relying in part on *Clark* v. *Barney*, 24 Okla. 455, 103 P. 598 (1909), is cited in support of this rule. No such finding can be presumed, however, in the face of a more recent common-law marriage and any such evidence necessarily contradicts a former spouse's claim of reconciliation. See *Hill* v. *Shreve*, 448 P. 2d 848 (1968), where the court discusses the presumption favoring validity of the last marriage, including marriage by common law, and places the burden of showing first marriage validity upon the party asserting same. Further, where validity of the first marriage is established, the *Hill* decision, which has not been overruled, supports a presumption that such marriage was dissolved by divorce or death and "casts the onus of adducing contrary evidence upon the party attacking the last marriage" 448 P. 2d at 851. *Hill* v. *Shreve*, *supra*, also observes that the "rigorousness" of the court's early decision in *Clark* v. *Barney*, *supra* (denying existence of a common-law relationship commenced when one of the parties deserted a living spouse) "has since been mollified by later decisions in more modern and changed times," at 850. See also, *Marcum* v. *Zaring*, 406 P. 2d 970 (1965), *McVey* v. *Chester*, 288 P. 2d 740 (1955); *Scott* v. *Scott*, 203 Okla. 60, 218 P. 2d 373 (1950); *Templeton* v. *Jones*, 127 Okla. 1, 259 P. 543 (1927).

Another challenge made to the determination that Clara Walker

[4] In addition, the record shows the Certificate of Death for Phillip Tooisgah identifies Clara as the surviving widow and that it is she who made arrangements for the decedent's funeral.

is the surviving widow of the decedent stems from a claim that Clara assumed a common-law marriage with a man named Jess Copley, now deceased, beginning in the 1950's, and that she therefore lacked capacity to become married to Phillip Tooisgah (Brief in Support of Appeal, p. 11).

Conflicting testimony was introduced on the above point, appellants placing great weight on evidence that the appellee once went by the name of Clara Walker Copley.[5] On the basis of the legal authority already cited, if a common-law marriage was established between Jess Copley and Clara Walker in the 1950's, which neither the Administrative Law Judge nor this Board perceives from the evidence presented,[6] the party asserting the validity of this "first marriage" must also overcome the presumption that such marriage was dissolved by divorce or death. The appellants failed to successfully rebut this latter presumption by disproving divorce.

Appellants further contend that a common-law marriage could not have been consummated by the decedent with Clara because of an insufficient showing of "exclusiveness of cohabitation" (Brief in Support of Appeal, p. 13). Borrowing out of context from Clara's testimony, the appellants' brief portrays that Clara admitted to meretricious practices of the decedent during the course of their relationship. In its entirety, however, the record discloses that Phillip and Clara were constant companions as husband and wife following the decedent's divorce from Velma, but for an occasional no-show on Phillip's part attributable to drinking (Tr. 84).

Review of Order Modifying Decision

On January 3, 1975, the Administrative Law Judge entered an order modifying his decision of July 19, 1974, regarding the provision of the 1969 divorce decree between Velma and Phillip Tooisgah which awarded Velma for the term of her natural life one-sixth of the gross income received from oil and gas production from lands held in trust for Phillip by the United States. The Administrative Law Judge's July 19, 1974, order authorized the continued payment of proceeds to Velma from the mineral interests in question in accordance with the state divorce decree. In response to a petition for rehearing submitted in behalf of Clara Walker Tooisgah concerning this determination, the Administrative Law Judge on January 3, 1975, reversed his prior order of July 19, 1974, by striking Velma's name as a distributee. This was done on the basis that the decree of divorce was not enforceable

[5] The record does not show that Clara used the name Copley after 1969.

[6] Appellants object to the Administrative Law Judge's ruling which allowed into evidence a purported affidavit from Jess Copley stating that Clara Walker was never his wife. Regardless of the admissibility factor that the declarant was not available for the hearing, it does not appear that Judge Curran relied, or needed to rely, on the purported Copley affidavit in reaching his decision that Clara possessed legal capacity to marry Phillip Tooisgah.

against trust property of the decedent.[7] Appellants object to the revised ruling as part of their appeal.

[2] Judgments entered against allottees of restricted land are voidable, as recognized by the Supreme Court in the landmark Oklahoma case, *Mullen* v. *Simmons*, 234 U.S. 192 (1914). Here, however, the appellants contend that the Secretary of the Interior consented to the payment of funds derived from trust property pursuant to a divorce settlement and that federal law provides the Secretary, or his duly authorized representative, with authority to so act.

As it stands, there is insufficient evidence in the record to permit a determination as to whether approval was given by an authorized representative of the Secretary to action taken in the divorce decree affecting trust property of the United States. The fact that periodic payments from oil and gas production were made by Phillip to Velma until his death in 1971 is a basis for speculating that governmental approval for such payments might have taken place.

[3] Despite the strict terms of the General Allotment Act of February 8, 1887 (24 Stat. 388), *as amended*, 25 U.S.C. § 354 (1970),[8] it is recognized that the Secretary of the Interior has authority to approve an agreement made by an allottee for the disposition of oil income from restricted lands. *Udall* v. *Taunah*, 398 F. 2d 795 (10th Cir. 1968). *See also* 25 U.S.C. § 483 (1970), enacted May 14, 1948, which authorizes the Secretary or his representative to approve conveyances of restricted land held by individual Indians under the provisions of the Indian Reorganization Act of 1934 (25 U.S.C. § 461 *et seq.* (1970)) and the Oklahoma Indian Welfare Act (25 U.S.C. § 501 *et seq.* (1970)).

In *Udall* v. *Taunah*, *supra*, it was deemed an abdication of the Secretary's responsibility for the Department of the Interior to fail to give any consideration to the merits of a family settlement contract concerning the assignment of oil income from restricted lands. The matter was remanded for a hearing to consider the appropriateness of contract approval in recognition of the fact that the Secretary had the authority and opportunity to approve the contract.

On the basis of the authorities referred to, the Board concludes that the January 3, 1975, Order Modifying Decision on Petition of Clara Walker Tooisgah should be vacated and the cause remanded for further proceedings. The task on remand will be to determine whether

[7] As to the scope of the term "restricted" or "trust" property, it has been held that an Indian's assignment of proceeds from a mineral lease of restricted land is void as constituting an assignment of part of his inalienable reversion. *United States* v. *Moore*, 284 F. 86 (8th Cir. 1922).

[8] 25 U.S.C. § 354 reads:

"No lands acquired under the provisions of sections 331–334 of this title shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor."

necessary Secretarial approval was obtained in the payment of oil and gas proceeds to Velma by Phillip pursuant to the terms of their divorce. This requested finding will dictate whether Velma should be reinstated as a distributee in the estate of the decedent. If approval prior to the entry of the divorce decree is not found, the Administrative Law Judge should nevertheless determine whether effective subsequent approval was obtained from an authorized representative of the Secretary, or, in the alternative, if there are compelling grounds for approval now.[9] A finding in favor of the appellant on this issue will also require an appropriate revised order on remand concerning attorney fees for Velma Tooisgah's counsel.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Denying Petition for Rehearing of Jonathan Morris Tooisgah and Velma Tooisgah issued January 3, 1975, by John F. Curran, Administrative Law Judge, be and the same is hereby AFFIRMED as to the determination of the decedent's legal widow. Such decision is final for the Department. IT IS HEREBY FURTHER DECIDED that the Order Modifying Decision on Petition of Clara Walker Tooisgah, issued January 3, 1975, and incorporated by reference in the Order Denying Petition for Rehearing of Jonathan Morris Tooisgah and Velma Tooisgah, above, be and the same is hereby VACATED and the cause REMANDED for further proceedings. ON REMAND, the Administrative Law Judge shall determine if the terms of the 1969 divorce decree between Velma and Phillip Tooisgah are enforceable against trust property of the decedent on account of approval by the Secretary of the Interior, in which case an appropriate order revising the distribution of the decedent's estate shall be entered as well as an order allowing commensurate attorney fees for Velma Tooisgah's counsel.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

ALEXANDER H. WILSON,
Administrative Judge.

[9] The Tenth Circuit stated in *Udall* v. *Tawnah, supra,* at 797:

* * * "There is no question but that included within the Secretary's authority and control of restricted allotted lands is the power to have approved the contract even though presented to him after the death of the allottee. See *Lykins* v. *McGrath,* 184 U.S. 169 [(1902)]." * * *

UNITED STATES
v.
JOHN J. CASEY

22 IBLA 358

Decided *November 14, 1975*

Appeal from decision of Administrative Law Judge Graydon Holt finding appellee's cattle in trespass and levying fine. Calif. 2–73–1 (SC).

Set aside and remanded.

1. Administrative Procedure: Administrative Procedure Act—Administrative Procedure: Decisions—Grazing Permits and Licenses: Trespass

A cattle trespass decision rendered by an administrative law judge may be set aside and remanded where the decision does not include a statement of findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion as required for initial decisions under 5 U.S.C. § 557 (1970) and 43 CFR 4.475.

2. Administrative Procedure: Decisions—Grazing Permits and Licenses: Trespass—Intervention

Where a grazing district cattle trespass complaint refers to previous trespasses by the base property owner, he is served with the complaint, and the record indicates he intervened at the hearing thereon but the decision issued makes no mention thereof, the decision appealed from may be set aside and remanded for clarification.

APPEARANCES: Burton J. Stanley, Esq., Solicitor's Office, Department of the Interior, Sacramento, California, for appellant; Ralph M. Tucker, Esq., Reno, Nevada, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GOSS

INTERIOR BOARD OF LAND APPEALS

The Bureau of Land Management (BLM) appeals from the January 7, 1974, Administrative Law Judge decision which found appellee's cattle to have been in repeated trespass and assessed damages of $6 per AUM of forage consumed, with total damages $120. The United States appeals only with respect to the leniency of the penalty, contending that grazing privileges owned or controlled by appellee should be severely reduced or eliminated. Departmental regulations provide that grazing privileges in a district may be reduced or eliminated for trespasses which are willful, grossly negligent, or repeated. 43 CFR 9239.3-2(e).

The proceedings were initiated by the California State Director of the Bureau who issued orders to show cause why appellee's grazing privileges should not be reduced or revoked due to alleged trespasses by cattle owned by appellee. The show cause orders alleged violations in February, March, July and August of 1973. A hearing was held beginning November 27, 1973, in Reno, Nevada.

The first series of trespasses are alleged to have occurred for the most part in an area known as the Rush Creek field, in T. 31 N., Rs. 17 and 18 E., Mount Diablo Meridian, Lassen County, California, and Washoe County, Nevada. They are alleged to have occurred between February 13, 1973, and March 8, 1973.

The second series of trespasses is alleged to have occurred between July 2, 1973, and August 8, 1973, primarily in an area known as Smoke Creek, T. 32 N., Rs. 17, 18 E., M.D.M., Lassen and Washoe Coun-

ties. Other trespasses at this time allegedly occurred in an area between the Painter Ranch and the Dodge Ranch, T. 34 N., Rs. 16, 17, 18 E., M.D.M., Lassen and Washoe Counties.

The Administrative Law Judge was in the process of retiring and his decision is quite brief. The relevant portion is as follows:

> * * * At the conclusion of the hearing a ruling was made that the Respondent had in fact been in trespass to the extent of 20 AUMs and that he had been in trespass repeatedly over a period of years in California, Nevada, and Montana. The Respondent established that in this case there had been mitigating circumstances in part.
>
> Accordingly, the Respondent was assessed $120 computed at the rate of $6 for 20 AUMs. * * *

Though a great deal of the hearing was devoted to whether the Casey cattle were in trespass, neither appellant nor appellee takes issue with Judge Holt's findings as to the unspecified trespasses. Appellant BLM argues that because of appellee's repeated trespasses, the penalty in this case should be much more severe. Appellee contends that Judge Holt's decision is correct as to the severity of the penalty, and also argues that because of procedural defects: (a) this Board may not review the case, and (b) no further penalty may be imposed even if it be found justified. He has moved for dismissal of the appeal.

[1] As to the Board's jurisdiction to review, 43 CFR 9239.3–2(h) provides:

> *Appeals.* Appeal from the decision of the administrative law judge to the Board of Land Appeals of any matter under this § 9239.3–2, shall be made in accordance with § 4.470 and Department Hearings and Appeals Procedures contained in Part 4 of this title.

Section 4.476 provides:

> Any party affected by the administrative law judge's decision, including the State Director, has the right to appeal to the Board of Land Appeals, in accordance with the procedures and rules set forth in this Part 4.

The brief record herein does not show compliance with the law or regulations. Departmental regulation 43 CFR 4.474(c) provides in part:

> * * * At the conclusion of the testimony the parties at the hearing *shall* be given a reasonable opportunity, considering the number and complexity of the issues and the amount of testimony, to submit to the administrative law judge proposed findings of fact and conclusions of law, and reasons in support thereof, or to stipulate to a waiver of such findings and conclusions. (Italics added.)

There is no indication the parties were given such opportunity, nor is there a stipulation to a waiver.

From the decision quoted, *supra*, it is not possible to determine which of the alleged trespasses occurred, nor otherwise to determine the basis for the $120 penalty. Almost 20 percent of the trespasses charged were apparently found not to have occurred at all, but these trespasses were not specified. While the Judge found some mitigating circumstances, these were not identified. Nor was there any identification of the circumstances which were found to have occurred and not held to be mitigated. The Administra-

tive Procedure Act, 5 U.S.C. § 557 (1970), requires in part:

> (c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.
>
> The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, *including initial*, recommended, and tentative decisions, are a part of the record and shall include a statement of—
>
> (A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
>
> (B) the appropriate rule, order, sanction, relief, or denial thereof. [Italics added.]

Further, 43 CFR 4.475 requires that the Judge

> * * * render a decision upon all material issues of fact and law presented on the record. * * * The reasons for the findings, conclusions, and decisions made shall be stated, and along with the findings, conclusions, and decision, shall become a part of the record in any further appeal. * * *

Such laws and rules are an integral part of the administrative process. In *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 432 (1935), the Supreme Court stated:

> * * * As the Court said in *Wichita Railroad & Light Co.* v. *Public Utilities Comm'n*, 260 U.S. 48, 59: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective." * * *

The courts have repeatedly stressed the importance of findings and conclusions if the agency is to be upheld on judicial review. In *USV Pharmaceutical Corp.* v. *Secretary of HEW*, 466 F. 2d 455, 462 (D.C. Cir. 1972), the Circuit Court explained the reason for the rule:

> * * * As we have frequently emphasized, findings of fact are not mere procedural niceties; they are essential to the effective review of administrative decisions. Without findings of fact a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support in the evidence. * * *

The reasons why findings are important to a reviewing court are discussed in more detail in *California Motor Transport Co.* v. *Public Utilities Commission*, 379 P. 2d 324 (1963). The reasoning set forth at 327 is equally important to a reviewing quasi-judicial board, and to the

parties in a proceeding before such a board:

> Such findings afford a rational basis for judicial review. (See 2 Davis, Administrative Law Treatise (1958) § 16.05.) The more general the findings, the more difficult it is for the reviewing court to ascertain the principles relied upon by the administrative agency. Even when the scope of review is limited, as in this case * * * findings on material issues enable the reviewing court to determine whether the commission has acted arbitrarily. * * * The ultimate finding of public convenience and necessity is so general that without more, a reviewing court can only guess at how it was reached. * * *
>
> Since findings on material issues indicate the basis for the decision the parties can prepare accordingly for rehearing or review. (See Barry v. O'Connell, 303 N.Y. 46, 100 N.E. 2d 127, 129–130.) "Furthermore, a disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost his case." (2 Davis, Administrative Law Treatise (1958) § 16.05.) * * *

It is of course true that even after a hearing the Board may make its own findings. *Casey Ranches*, 14 IBLA 48, 55 (1973); *United States* v. *Middleswart*, 67 I.D. 232, 234 (1960); 5 U.S.C. § 557(b) (1970). In the circumstances of this case, however, where the findings are almost totally lacking, it is believed that a remand is more appropriate.[1] See *Associated Drilling Company* (*Kephart Mine*), 2 IBMA 95, 80 I.D. 317 (1973); *cf. United States* v. *Shield*, 17 IBLA 91 (1974). Otherwise, the Board is faced with a dilemma similar to that described by Justice Cardozo in *United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 294 U.S. 499, 510–511 (1935):

> * * * In the end we are left to spell out, to argue, to choose between conflicting inferences. * * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

[2] An additional reason for remand is present in the question of whether Holland Livestock Ranch is properly a party in these proceedings. Service was made upon Holland Livestock Ranch by certified mail. Though the complaint does not specifically name Holland Livestock Ranch, previous trespasses committed by the Ranch are cited at page 3, paragraphs 5 and 6. Holland Livestock Ranch intervened as a party at the hearing, as is shown at Tr. 1, 2:

> MR. TUCKER: If your Honor please—excuse me—you asked me what the representation was, and I also wanted to indicate that insofar as this show cause order purports to affect any of the rights of Holland Livestock Ranch, a co-partnership, I am representing them also, and if the assertions in any way include Holland Livestock Ranch rights, we should be considered as an intervenor in that regard.
>
> THE COURT: Is Holland Livestock involved here?
>
> MR. STANLEY: Yes, they are, your Honor. They own the lands that are involved. They were served with a copy of the Order to Show Cause also. Holland Livestock owns all the base properties in the Susanville District.
>
> THE COURT: All right. * * *

[1] A decision in compliance with 5 U.S.C. § 557 (1970) and 43 CFR 4.474(c), both *supra*, may be made by a successor administrative law judge under 5 U.S.C. § 554(d) (1970) without rehearing the evidence. If a party submits that the demeanor of a particular witness is important to a finding, the witness' testimony may be reheard.

The record thus indicates Holland intervened, but the decision does not mention Holland. A ruling should be made as to whether Holland Livestock Ranch[2] or other entity is a party to this proceeding, whether charges are involved and the disposition thereof, and the basis for said determination should be set forth.

Therefore, pursuant to the authority delegated to the Board of Land Appeals, by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded.

JOSEPH W. GOSS,
Administrative Judge.

I CONCUR:
MARTIN RITVO,
Administrative Judge.

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

I cannot agree that further action is warranted in this case.

The appropriate regulation, 43 CFR 9239.3-2(e), provides that a licensee's or permittee's grazing privileges may be reduced or eliminated because of willful, grossly negligent, or repeated trespasses. A review of the case law reveals, however, that the Department has required that several elements be present before it will order a *severe* reduction of a licensee's or permittee's grazing privileges. Those elements may be roughly classified as follows: (1) the trespass must be willful; (2) there must be a fairly large number of animals involved; (3) the violation should occur over a fairly long period of time, and (4) there may be a failure to take prompt remedial action upon notification. For example, in *L. W. Roberts*, A-29860 (April 23, 1964), the licensee was allowed to graze 5,600 sheep in the specified area. Instead, he chose to graze 8,000 sheep in the area for an entire season. For similar cases, *see Eldon L. Smith*, 8 IBLA 86 (1972); *Mrs. R. W. Hooper*, 3 IBLA 330 (1971); *Alton Morrell*, 72 I.D. 100 (1965); *Clarence S. Miller*, 67 I.D. 145 (1960); *Eugene Miller*, 67 I.D. 116 (1960); *J. Leonard Neal*, 66 I.D. 215 (1959).

In some cases where the trespass was found to be repeated but not willful, privileges have been reduced by 10 percent for a period of a year. *See, e.g. Edmund Walton*, A-31066 (May 27, 1969); *see also John Gribble*, 4 IBLA 134 (1971), where the trespass was not willful and there was prompt remedial action, but there were no mitigating circumstances and the fences were not in good condition.

Where, however, there are extenuating circumstances, this Board has declined to impose reduction of grazing privileges. *State Director Utah* v. *Chynoweth Brothers*, 17 IBLA 113 (1974); *Lawrence F. Bradbury*, 2 IBLA 116 (1971).

Judge Holt's decision is very brief, and he makes no detailed elaboration of the factors which influenced his assessment of the

[2] Holland Livestock Ranch is stricken from the caption of the orders issued herein. Appellee's other procedural motions are denied.

penalty. However, in the decision he does allude to his finding that, "The Respondent established that in this case there have been mitigating circumstances in part." The record of the hearing shows that much of the evidence adduced in defense of the charges was in mitigation and extenuation of the trespasses alleged. For example, it was asserted that a herd of wild horses had run through a division fence, and the fence was flattened; that the telephone company had torn down "quite a lot of fence;" that gates had been torn down and left open by people not employed by the respondent or the intervenor; that diligent efforts had been made to inspect and maintain fences and to prevent trespass and/or recover trespassing livestock, etc.

We cannot estimate the weight which the Administrative Law Judge accorded this evidence but, in light of his holding, it would appear that he attached considerable importance to it. We can conclude, however, that there is sufficient evidence of mitigating circumstances in the record to withstand any allegation by appellant that the Judge's finding is not supported by the evidence. In *United States* v. *Chartrand*, 11 IBLA 194, 212, 80 I.D. 408, 417 (1973), this Board made the following declaration:

> This Department has a long-standing practice of affording considerable weight to the findings of the trier of fact at an administrative hearing. The reason for this practice is because the trier of fact who presides over a hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded conflicting testimony. *See Forrest B. Mulkins*, A-21087 (December 8, 1937), I.G.D. 22; *United States* v. *Humboldt Placer Mining Company*, 8 IBLA 407 [79 I.D. 709, 722] (1972). We recognize that the Board of Land Appeals has authority to reverse the fact findings of a Judge; however, where, as here, the resolution of a case depends primarily upon his findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside by this Board. *State Director for Utah* v. *Dunham*, 3 IBLA 155, 78 I.D. 272 (1971), and cases cited therein.

While the evidence does not establish beyond question that all of the mitigating and extenuating circumstances described actually prevailed, or that they had the effect alleged in every instance, since Judge Holt's determination rests in large part upon his opportunity to observe and assess the credibility of the witnesses, I would not disturb his findings. In addition, as noted in the briefs of both sides, Judge Holt has heard other cases involving Casey and Holland Livestock, and he has not hesitated to impose severe penalties when, in his opinion, such penalties were warranted.

Accordingly, I would affirm the decision appealed from.

Moreover, while Judge Holt's decision is considerably less than a paradigm of quasi-judicial exposition, I cannot agree that it is so dissonant with the requirements of the Administrative Procedure Act as to constitute a nullity. The decision expressly found (1) that there was a trespass of cattle; (2) that the Respondent had been repeatedly in trespass over a period of years

in California and Nevada; (3) that the specific extent of the trespass demonstrated in this case was 20 animal unit months; (4) that Respondent had established that in this case there had been mitigating circumstances in part; (5) that based upon these findings the Respondent should be assessed $120, computed at the rate of $6 per AUM. These are nothing more nor less than a statement of the Judge's findings and his holding. While the decision may comport only with the minimum standards of the Act, I regard it as adequate compliance.

Finally, I regard the remand for the purpose of having the case assigned to "a successor administrative law judge" to review the record and write a new opinion to be unnecessarily cumbersome, expensive and time consuming. The entire record, consisting of four volumes of testimony and 92 exhibits, is properly before us now. Procedural due process requires only that all of the testimony, exhibits, briefs and other documentary material in the record be carefully reviewed and considered by the Board. *See* note, *Steenberg Construction Co.*, 79 I.D. 158, 163 (1972). We have studied this record carefully and there is nothing preventing us from rendering a decision which would conclude the administrative process. Instead, it will be referred to someone who is totally unfamiliar with the case to undertake what I presume will be a *de novo* review and render a new decision which will almost certainly bring the same record back to us on appeal again, no matter how it is decided. Frankly, I fail to understand what salutory purpose the majority thinks will be served thereby. This case has already consumed an enormous amount of time, resources and money, which I regard totally disproportionate to either the seriousness of the offenses alleged or the principle involved, that principle having been fully established and well served by the proceedings already concluded.

EDWARD W. STUEBING,
Administrative Judge.

BISHOP COAL COMPANY

5 IBMA 231
Decided *November 18, 1975*

Appeal by Bishop Coal Company from a decision by Administrative Law Judge George H. Painter in Docket No. HOPE 74-329 upholding the validity of an unwarrantable failure withdrawal order issued pursuant to sec. 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 for an alleged violation of a roof control plan.

Reversed.

1. Federal Coal Mine Health and Safty Act of 1969: Mandatory Safety Standards: Roof Control Plans

An operator cannot be cited for a violation of a revision of a purported approved roof control plan unless such revision is first adopted by such operator. 30 U.S.C. § 862(a) (1970). 30 CFR 75.200, 75.200-2.

2. Federal Coal Mine Health and Safety Act of 1969: Administrative Procedure: Rulemaking

The "approval" function of the Secretary with respect to roof control plans, exercised at the enforcement level by a MESA District Manager under 30 CFR 75.200–4, is not subject to the rulemaking provisions of secs. 101 and 301(d) of the Act. 30 U.S.C. §§ 811, 861(d) (1970).

APPEARANCES: Timothy M. Biddle, Esq., and L. Thomas Galloway, Esq., for appellant, Bishop Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor, Marcus P. McGraw, Esq., and Robert J. Araujo, Esq., Trial Attorneys, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Bishop Coal Company (Bishop) appeals to the Board to overturn a decision by Administrative Law Judge George H. Painter in Docket No. HOPE 74–329 sustaining the validity of a sec. 104(c)(1) withdrawal order that cited an alleged unwarrantable failure to comply with a rib support provision of the roof control plan then allegedly in effect at the Bishop Mine. 30 U.S.C. §§ 814(c)(1), 862(a) (1970), 30 CFR 75.200. On appeal, Bishop contends that Judge Painter erred in upholding the subject withdrawal order on three grounds. First, Bishop argues that his finding and conclusion that a violation of a mandatory standard had occurred was erroneous because the rib support provision in question was not an effective and binding part of the roof control plan for the subject mine, it never having been "adopted" within the meaning of the Act and the regulations. 30 U.S.C. § 862(a) (1970), 30 CFR 75.200, 30 CFR 75.200–2. Second, Bishop submits that the subject rib support provision never became effective and binding because it was not issued by MESA in accordance with the procedures set forth in secs. 101 and 301(d) of the Act. 30 U.S.C. §§ 811, 861(d) (1970). Third, Bishop insists that reversal is called for because Judge Painter failed to make a finding of unwarrantable failure and the record will not support such finding.

For the reasons set forth in detail hereinafter, we are of the opinion that Bishop did not "adopt" the revised roof control plan containing the rib support provision which it is alleged to have violated, and therefore was improperly cited with a sec. 104(c) withdrawal order for a violation thereof. In addition, we reject Bishop's further claim that secs. 101 and 301 of the Act are applicable to the revising of roof control plans, and we deem it unnecessary and inappropriate to reach Bishop's third assignment of error regarding the Judge's omission of any finding of an unwarrantable failure to comply. Having concluded that there was no violation of a mandatory standard, we are reversing the decision below and

vacating the subject withdrawal order.

Procedural and Factual Background

The Bishop Mine is owned and operated by the Bishop Coal Company. It is located in the State of West Virginia within the Mount Hope District of the Mining Enforcement and Safety Administration (MESA), and is an operation of comparatively moderate size; throughout 1973, there were approximately 310 men employed in the nine working sections (Tr. 4, 10).

On January 12, 1972, a revised roof control plan for the Bishop Mine apparently went into effect (Joint Exhibit No. 1). There is no dispute that that plan, subsequent to its adoption and approval, was continuously in effect throughout 1972 and 1973. The pertinent distinguishing feature of that plan, insofar as this case is concerned, is that it contained no provisions dealing with *rib* support and control.

Between July 25, 1973, and September 14, 1973, MESA Inspector Joseph Filipek conducted a roof control survey to determine the adequacy and effectiveness of the 1972 plan. Although Mr. Filipek never completed his survey, he did advise MESA's Mount Hope roof control specialist, Mr. Charles Hambric, that Bishop's plan should be revised to include requirements for rib support (Tr. 158). He did not so advise Bishop. This recommendation was based upon his observation of rib rolls in one of the working sections.

On October 25, 1973, Inspector Filipek, together with Mr. Hambric and a representative of the West Virginia Department of Mines, conducted an inspection of roof conditions at the Bishop Mine. Following completion of that inspection, a meeting was held at the subject mine at the request of Mr. Hambric on October 26, 1973. Present at this meeting were the same officials who had inspected the mine the previous day, representing MESA and the State of West Virginia, respectively, as well as the following Bishop employees: Mr. Richard Baugh, Mine Superintendent; Mr. Clem Grindstaff, Mine Foreman; and Mr. Robert Little, Safety Inspector.

At that meeting, for the first time, MESA indicated to Bishop that its existing plan was deficient. The MESA representatives presented 25 separate provisions they thought should be included in the roof control plan for the Bishop Mine. Of these 25 provisions, 22 were listed on a typewritten form and were apparently being used as a basis for eliciting general revision of roof control plans throughout the Mount Hope District (Tr. 135–136, 141). The remaining three provisions were in the form of handwritten notes brought by Mr. Hambric and dealt with rib support requirements tailored to existing conditions at the Bishop Mine.

Following discussion of the rib control provisions, Mr. Hambric induced Superintendent Baugh to sign in blank a MESA form, a copy of which appears in the record as page 2 of Government Exhibit No. 3 and which we are attaching as Appendix A, p. 566 to this opinion. Government Exhibit No. 3 contains the roof control plan which Bishop is alleged to have violated, and MESA contends that the signature of Mr. Baugh constituted Bishop's agreement as to the 25 proposed revisions.

On January 2, 1974, Inspector Donald C. Phillips issued a notice of violation, pursuant to sec. 104(c)(1) of the Act, citing an alleged unwarrantable failure to comply with the 1972 roof control plan.

Eight days later, on January 10, 1974, Bishop received a revised roof control plan (hereinafter referred to as the 1974 plan), the effectiveness of a part of which is now in issue before the Board. Included in such plan were the 25 provisions referred to above, among which was the rib support provision under which Bishop was cited in the subject withdrawal order (Tr. 27).[1] This plan was accompanied by the MESA form, referred to earlier, which Mr. Baugh had signed in blank. This document was completely filled in and showed an approval without reservation by J. M. Krese, District Manager, apparently on December 17, 1973. *See* Appendix A, *infra* at 566. The subject plan contained no effective date as such, but it did require that the appropriate individuals be instructed as to its provisions within 1 week of receipt.

By letter to J. M. Krese dated January 17, 1974, Bishop's Vice President, Mr. Harold K. Franklin, initiated a protest of the 1974 plan and requested an opportunity to discuss its provisions. Subsequently, a meeting was set for January 24, 1974.

However, before that meeting could take place, the subject sec. 104(c)(1) withdrawal order, 1 DCP, January 22, 1974, was issued by Inspector Phillips. The condition cited in that order reads as follows (Government Exhibit No. 1):

> The approved roof control plan was not being followed in Cove 3 Section in that loose unsupported coal ribs were observed along the active shuttle car roadway at two locations in No. 2 entry starting approximately 75 feet inby spad 1769. The rib supports were not installed along the active shuttle car roadway in Nos. 1 and 2 Rooms for a distance of 55 feet along the left rib and 25 feet along the right rib in No. 1 Room and rib support was not provided for 113 feet along the right rib in No. 2 Room. The height of the places including rash is 8 feet. The roof control plan had not been explained to the workmen.

[1] The subject provision of the alleged roof control plan provides as follows:

"During rehabilitation of roadways on pillar recovery sections where rib supports were not installed during development, the following precaution shall be taken: After the belt has been taken off or track moved back to make a new dumping point, all ribs along the active shuttle-car roadways from the dumping point to the faces shall be supported prior to starting the mining cycle where the height of the place (including rash) is six feet or more or where excessive sloughing is encountered."

On January 24, 2 days later, Mr. Franklin and Mr. Krese met and discussed the 1974 plan, as well as the January 22 withdrawal order. Bishop obtained no relief as a result of this meeting, and on February 20, 1974, filed an application for review, challenging the validity of the subject withdrawal order.

On March 4, 1974, MESA filed a timely answer admitting the issuance of the disputed withdrawal order, averring that it was properly issued under sec. 104(c) of the Act, and denying all other allegations. Coincidentally, on the same date, the United Mine Workers of America (UMWA), as representative of the miners, also filed an answer in opposition, contending that the order in question was valid in all respects.

A public hearing was held before Judge Painter on April 18, 1974, at which time MESA and Bishop submitted evidence. The UMWA did not participate then or at any time thereafter before the Judge. Subsequent to the hearing, Bishop filed a brief, and MESA did likewise along with proposed findings of fact and conclusions of law.

Judge Painter handed down his decision on July 17, 1974, and pursuant to 43 CFR 4.600, Bishop noted an appeal on August 5, 1974. Timely briefs were filed by Bishop and MESA and oral argument before the undersigned panel took place on August 22, 1975. The UMWA has not participated on appeal.

Issues on Appeal

A. Whether the Administrative Law Judge erred in sustaining the inspector's finding in the subject sec. 104(c)(1) withdrawal order that Bishop had violated a mandatory standard, to wit, a rib support provision of a revised roof control plan which Bishop is alleged to have adopted.

B. Whether revisions of existing roof control plans must be issued by MESA in accordance with procedures set forth in secs. 101 and 301 of the Act.

Discussion

A.

[1] As we noted in our introduction, Bishop contends in substance that the rib support provision of the subject roof control plan under which it was cited never acquired the force and effect of law because such provision was never "adopted" by it within the meaning of the Act and the regulations. 30 U.S.C. § 862(a) (1970), 30 CFR 75.200, 30 CFR 75.200–2.

In responding to this argument, MESA does not challenge Bishop's basic premise that it must "adopt" revisions to existing roof control plans before they can become effective. Rather, MESA contends that Bishop agreed to the particular revision here under scrutiny and that in any event the record will sustain Judge Painter's finding that Bishop tacitly accepted such revision by not protesting it after the

October 26, 1973, meeting described above.

In order to deal with these contentions in perspective and because this dispute is a threshold case in many respects, we deem it appropriate to set forth here our understanding of the interplay of legislative and regulatory policies regarding roof and rib control plans. However, our analysis is not to be taken as an exhaustive discussion of *all* problems of interpretation posed by the Act and the regulations in this critical area.

Sec. 302(a) of the Act embodies the pertinent interim mandatory standard, 30 U.S.C. § 862(a) (1970), and has been accepted without material change by the Secretary as the basic statement of regulatory policy and law governing roof and rib control, 30 CFR 75.200, 35 FR 17895 (November 20, 1970). It provides as follows:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form on or before May 29, 1970, within sixty days after the operative date of this subchapter. The plan shall show the type of support and spacing approved by the Secretary. Such plan shall be reviewed periodically, at least every six months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs. No person shall proceed beyond the last permanent support unless adequate temporary support is provided or unless such temporary support is not required under the approved roof control plan and the absence of such support will not pose a hazard to the miners. A copy of the plan shall be furnished the Secretary or his authorized representative and shall be available to the miners and their representatives.

Under this sec. of the Act and regulations, an operator has two major obligations which are, on the one hand, adequate support or control of roof and ribs in any underground coal mine, and on the other, adoption and revision of a roof control plan "* * * suitable to the roof conditions and mining system * * *" of any such mine. Although a given dangerous roof or rib condition may constitute a violation of either obligation, the fact that such a condition is not covered by a provision of a roof control plan is no bar to a citation for failure to support or otherwise control the roof or ribs "adequately," within the meaning of the Act. *Zeigler Coal Co.*, 2 IBMA 216, 80 I.D. 626, 1973–1974 OSHD par. 16,608 (1973).

With respect to the operators' roof control plan obligation, the Secretary has promulgated a series of regulations which fill in some of the interstices, if not all, of sec. 302(a) and 30 CFR 75.200. These regulations are codified at 30 CFR 75.200–1 through 30 CFR 75.200–14.

Secs. 75.200–1 and 75.200–2 reinforce the statutory allocation to the operator of the obligation to

"adopt" a roof control plan.[2] Section 75.200–3 clarifies a point of procedure by requiring that the operator file the plan it has adopted with the District Manager of the appropriate MESA district for approval.[3] We construe these regulations to apply to the adoption and filing of revised or amended plans, as well as to initial plans.[4]

Sec. 75.200–4 describes the procedure to be followed by the District Manager in exercising the Secretary's approval function under the Act at the enforcement level. He is required, in our view, to notify the operator *in writing* of a disapproval of, or the need for changes in, a roof control plan proposal adopted and filed by such operator for approval, and must include in such notice a concise, general statement of the reasons for such action.[5] Obviously, if an operator, acting on its own initiative, submits a proposal with an objective wholly unacceptable under the criteria for approval[6] and in light of the prevailing roof and rib conditions at the subject mine, then of course such proposal

[2] Secs. 75.200–1 and 75.200–2 of 30 CFR read as follows:

"§ 75.200–1 Roof control program requirements.

"Each operator shall adopt an adequate program for improving roof control systems. This program shall include a roof control plan, provision for the training of miners, a history of all unintentional roof falls, and systematic evaluation of the effectiveness of the roof control system in use.

"§ 75.200–2 Roof control plans.

"Each operator shall adopt a roof control plan suitable to the roof conditions and the mining system for all underground roadways, travelways including escapeways, and working places of each mine."

[3] Sec. 75.200–3 provides as follows:

"Filing of roof control plans.

"Roof control plans shall be filed with the District Manager of the Coal Mine Health and Safety District in which the mine is located."

Although the above-quoted regulation does not state that filing is for the purpose of obtaining approval, it is logical to so conclude inasmuch as 30 CFR 75.200–3 is between one regulation requiring operator adoption of a roof control plan and another prescribing the manner in which the approval function of the Secretary shall be exercised at the enforcement level.

[4] The lack of clarity in the regulations, with respect to whether they apply to revising an *existing* roof control plan, has, as the record shows, led MESA personnel in the field to think that there are no published, Department-wide, specific procedures and standards applicable to such revisions (Tr. 51–52, 76–77, 145).

[5] Sec. 75.200–4 of 30 CFR provides as follows:

"Actions on roof control plans.

"The appropriate District Manager shall notify the operator in writing of the approval of a proposed roof control plan. If revisions are required for approval, the changes required will be specified and the operator will be afforded an opportunity to discuss the revisions with the District Manager."

Although this regulation does not in so many words require notification of changes *in writing*, such requirement is implicit in the notion of "specifying." This construction is also fair, avoids the appearance of arbitrariness, and is not onerous. Moreover, such notification should limit controversy over the question of whether the District Manager has complied with the procedures set forth in the regulation.

Contrary to Bishop's contention, we are of the view that the District Manager need not make formal detailed findings of fact. The making of such findings is strictly an adjudicative function, and a District Manager under 30 CFR 75.200–4 is not exercising such a function.

[6] The criteria for approval are set forth at 30 CFR 75.200–6 through 30 CFR 75.200–14. The subject rib support provision is not *specifically* covered by any of these criteria, but was apparently required in the case at bar under the sentence in 30 CFR 75.200–6 concerning the District Manager which reads: "* * * Additional measures may be required." * * * Bishop has not argued that rulemaking, informal or otherwise, is necessary before applying an unpublished criterion.

may be rejected out of hand. However, if a proposal has a legitimate objective, but is in need of change, the District Manager under the subject regulation, must specify in writing the nature of the changes and afford the opportunity to discuss and negotiate over such changes. It is of course implicit that the District Manager also specify a reasonable time within which to adopt and file an amended proposal for approval under 30 CFR 75.200–1 through 75.200–3. In notifying an operator in writing of the deficiencies of its proposal and suggested changes, a District Manager must be sufficiently specific to adequately apprise an operator of what they are. When outlining changes, a District Manager does have the leeway to suggest draft language or deletions from the proposal at hand, but he cannot impose them by fiat upon an operator who refuses to "adopt" such changes. It is after all the operator who must determine whether to adopt suggested or negotiated changes or to litigate in the face of enforcement actions by MESA which are bound to follow an impasse with the District Manager.[7]

As the foregoing analysis shows, the regulations do in some measure provide guidance in a number of matters left by the Congress to the Secretary to determine. However, there are some matters left to implication by the statute which are not dealt with by the regulations and which the Secretary apparently decided should be settled, for the time being, on a case-by-case basis. Among these matters are the actions to be performed by MESA to induce the undertaking of a revision of an existing roof control plan when a deficiency is perceived by an inspector and the related problem of the circumstances under which an operator becomes subject to citation for failure to adopt an appropriate revision of an existing plan which, albeit still effective, is no longer completely "* * * suitable to the roof conditions and mining system * * *" of the subject mine. 30 U.S.C. § 862(a) (1970), 30 CFR 75.200.

Under the Act, the operator and the Secretary are obliged, respectively, to review the effectiveness of an existing plan on a periodic basis to determine whether revision is appropriate.[8] At the very least, the Secretary must perform that task semiannually. Although the Act does not say so expressly, it is implicit that the Secretarial obligation to review carries with it the corollary requirement to report in writing to the operator any deficiency in the plan which is found. It is this report which puts the operator on notice that a revision must be adopted and filed for ap-

[7] Compliance with the provisions of an approved revised plan by an operator would appear to result in the waiver of a claim that the District Manager failed to follow the regulations or that the plan was never adopted.

[8] Sec. 302(a) of the Act and 30 CFR 75.200 state with respect to existing roof control plans that: "* * * Such plan shall be reviewed periodically, at least every six months by the Secretary, taking into consideration any falls of roof or ribs or inadequacy of support of roof or ribs." * * *

proval. Indeed the record in the case at hand indicates that MESA has already seen the logic of this interpretation. The relevant portion of the inspector's manual instructs an inspector to advise the operator of any observed deficiencies in its roof control plan.[9] Moreover, the transmittal sheet in Government Exhibit No. 3 refers specifically to a report of the results of the inspector's survey of the effectiveness of the existing roof control plan to be furnished to responsible corporate officials including the company president. *See* Appendix B, *infra* at 567.

With respect to the point in time when an operator becomes subject to citation under the Act and regulations, we think that the language of sec. 302(a) and its regulatory twin, 30 CFR 75.200, indicates that such liability does not attach immediately upon a determination that the existing plan is in some measure unsuitable to roof and rib conditions as currently perceived. These provisions require an operator to adopt and obtain approval for a revised plan, and indicate that liability to citation for failure to adopt and file a suitable revision attaches only after the time for the accomplishment of such tasks has expired. This interpretation is entirely in accord with the legislative purpose here which is the maintenance of a systematic, ongoing, preventive effort to raise prevailing standards of care in this critical area. Moreover, such interpretation is compatible with the immediate safety interests of the miners because, as we decided in *Zeigler*, *supra*, lack of a pertinent roof control plan provision is no defense to a notice of violation or a withdrawal order predicated upon a failure to support or otherwise control adequately the roof and ribs of a mine.

In our opinion, an operator, who has been formally notified of the need for revising its existing plan, becomes subject to citation when it fails to adopt and file for approval a revision thereof, suitable to the current evaluation of roof and rib conditions, *within a reasonable period of time*. And as indicated above, we are of the view that whenever MESA places an operator on notice to take an action with respect to revising an existing plan, it should notify such operator of the deadline for accomplishing the task with an admonition that, upon the expiration of such deadline, citations for failure to adopt and file for approval a revised roof control plan "* * * suitable to the roof conditions and mining system * * *" of the subject mine may follow.[10]

[9] The manual cryptically states: "* * * the operator shall be advised that the roof-control plan is considered inadequate and should be revised." *Coal Mine Safety Inspection Manual For Underground Mines*, September 1972, 75.200–6. This requirement does not expressly appear in the regulations governing roof control plans, but it can be inferred therefrom.

[10] We note in passing that the subject plan contains no deadline date as such for putting its provisions into effect. Moreover, Mr. Krese's approval was not given subject to the plan being made effective on a date certain. Bishop has not argued the significance of this omission.

Having set forth the foregoing basic background for analysis, we turn now to the specific contentions of Bishop on appeal, the first of which is, as noted earlier, that the provision of the roof control plan under which it was cited in the subject withdrawal order never became part of the roof control plan for the Bishop Mine.

With respect to this contention, the focal point of the dispute is the signature of the Bishop Mine Superintendent, Richard Baugh, which was affixed to a blank form that was subsequently filled in by MESA and appears on page two of Government Exhibit No. 3. *See* Appendix A, *infra* at 566.

MESA has argued throughout this case that Mr. Baugh's signature constituted agreement by Bishop to, as well as adoption of, the subject revision of its roof control plan covering rib supports. Bishop has persistently claimed that his signature was nothing of the sort, although it has not proffered an alternative theory to account for it. MESA has also supported the Judge's theory that there was tacit acceptance by failure to timely protest.[11]

In its case-in-chief, MESA simply introduced the document containing the disputed signature,[12] but did not call to the stand anyone who was present when Mr. Baugh signed it. MESA's sole witness was the inspector who issued the subject withdrawal order, Mr. Donald C. Phillips.

It can hardly be said that the subject document speaks for itself. Mr. Baugh's signature appears toward the bottom of the page on a line with the description "Company Official's Signature" beneath it. Next to this line are two others, one for the title of the signing company official and the other for the date of signature. Mr. Baugh's signature does not follow any formal statement; nor does the document indicate that he was affirming, agreeing to, or adopting anything. Standing *by itself*, that signature is devoid of probative value.

Bishop, as part of its rebuttal, called some of the persons who were present when the disputed document was signed and we have in the record a number of accounts of the circumstances surrounding the making of this signature. Among the persons present at the pertinent time and testifying at the hearing before Judge Painter were Richard Baugh himself, as well as Inspectors Hambric and Filipek.

Mr. Baugh recalled signing the document in question, but could not recall why he had signed it (Tr. 94). He stated: "I didn't get the impression that there would be no further

[11] In its brief on appeal, MESA also argued that the finding of violation below can be upheld on the theory that the lack of rib support in this case constituted a violation of the obligation to support the ribs adequately. We reject this argument because MESA is obliged to defend the order as written, and quite plainly, the citation exclusively concerns the failure to conform to the subject plan. Brief of MESA, p. 8.

[12] Such document was received into the record without objection.

meetings, and I fully expected that there would be" (Tr. 91).

Inspector Hambric's memory was considerably better. He said at Tr. 142:

> Well I was under the *opinion* that Mr. Baugh agreed to everything that was said in our meeting there. This is why I asked him to sign this cover sheet. This cover sheet was a blank sheet and I said, *"If you would sign this sheet, two copies,"* I said, *"It will expedite this plan. You'll get it much faster. * * *"* (Italics added.)

The basis for the above-quoted "opinion" seems to have been that Mr. Baugh did not ask for additional time, an omission which Inspector Hambric thought warranted the assumption that none was wanted (Tr. 142).

When questioned on the same subject, Inspector Filipek gave a significantly different account. When queried with respect to what Mr. Baugh was told when he signed the subject cover sheet, the inspector testified as follows at Tr. 159–160:

> He was told that by signing that that roof control plan revisions were discussed in detail and that would be his roof control plan, and by signing it that it would speed the process up in processing the plan.

Mr. Filipek made clear that Mr. Baugh and the other Bishop representatives were so advised by *Mr. Hambric* who apparently was the MESA spokesman at the October 26, 1973 meeting where the subject rib support provision was discussed (Tr. 159).

Judge Painter did not make credibility findings, and we assume that, if Mr. Baugh's professed lack of recall had been belied by his demeanor on the stand, the Judge would have so found. Accordingly, we find that Mr. Baugh's memory deficiency was honest rather than convenient. Moreover, given Inspector Hambric's testimony, quoted above, we attribute his failure of recollection to a lack of appreciation of the significance of his act.

Inspector Hambric never told Mr. Baugh, in so many words, that his signature constituted agreement to or adoption of the subject proposed revision; he merely *surmised* that Mr. Baugh knew that such would be the case. All that he ever directly told Mr. Baugh, according to his testimony, was that the signature would expedite the plan, but he did not explain what he meant by that cryptic remark. Inspector Filipek's statement to the effect that Mr. Baugh was specifically advised by Mr. Hambric that he was agreeing to the subject revision is simply not borne out by the latter's testimony.

In its brief on appeal, MESA argues that Mr. Baugh understood the significance of his signature because the same procedure was used to accomplish revisions of roof control plans in other Bishop Mines, as well as a previous revision of the plan for the subject mine (Tr. 69, Brief of MESA, p. 4). We find this argument unpersuasive because MESA never placed in the record any details of other revisions which would have enabled us to evaluate

their significance with regard to Mr. Baugh's knowledge. All that we have here are some vague, conclusory, largely hearsay, claims of similarity which deserve and are being accorded no weight.[13]

Given that the signature in question does not affirm any statement of agreement to the subject rib support provision and in light of the inconsistent and vague statements of Inspectors Hambric and Filipek, we find that Bishop did not agree, at least expressly, to include such provision in a revised roof control plan. Furthermore, we hold, that such *express* agreement or some other affirmative act of Bishop was essential to "adoption" within the meaning of sec. 302(a) and 30 CFR 75.200 and 75.200–2.[14] We reject the theory, stated by the Judge and acted upon by MESA, that silence by itself amounted to tacit acceptance. If we were to so hold, we would thereby effectively accomplish a shift in responsibility for adopting appropriate revisions to existing room control plans which, as we stated earlier, is allocated by the Act and the regulations exclusively to operators. Accordingly, we conclude that the subject rib support provision never became part of the roof control plan for the subject mine, and in failing to adhere to it, Bishop cannot be cited for a violation of sec. 302(a) and 30 CFR 75.200 for failure to follow "the approved roof control plan."

B.

[2] Having concluded that the Judge erred in sustaining the inspector's finding of a violation of a mandatory standard, we can vacate the subject withdrawal order, which was premised on such finding, without reaching Bishop's alternative contention that a revised roof control plan must be "issued" in accordance with the procedural requirements of secs. 101 and 301(d) of the Act. Brief of Bishop, p. 11. 30 U.S.C. §§ 811, 861(d) (1970).[15] However, inasmuch as this matter involves purely questions of law and has been fully briefed and orally argued, we deem it appropriate to state our opinion with respect thereto.

Sec. 101 of the Act sets forth the rulemaking procedures which the Secretary is obliged to go through in issuing "appropriate, improved mandatory safety standards" where he has the power and responsibility under the Act to "develop, promulgate, and revise" such standards. 30 U.S.C. § 811(a) (1970).

Sec. 301(d) provides that:

> In any case where the provisions of sections 302 to 318, inclusive of this title

[13] We note that there is some evidence in the record that the procedures in the Mount Hope District were not followed in this case. Apparently, after meeting with operator representatives and negotiating changes in a roof control plan, it apparently was the practice to submit the result of such meeting to the operator in *final* form for its adoption prior to its becoming binding and effective (Tr. 79–80).

[14] But *see* n. 7, *supra*.

[15] Bishop also argued that MESA was required to revise roof control plans in accordance with subsection (c) of section 301, as well as subsection (d) thereof. 30 U.S.C. § 861(c) (1970). Brief of Bishop, p. 21. This argument is obviously without merit and too insubstantial to require extended discussion.

provide that certain actions, conditions, or requirements shall be carried out as prescribed by the Secretary * * * the provisions of section 553 of title 5 of the United States Code shall apply * * *.

Sec. 553 of 5 U.S.C. is of course the generally applicable rulemaking statute.

By way of response, MESA argues that secs. 101 and 301(d) are inapplicable because the provisions of roof control plans are not mandatory standards and because the Congress never intended that such revisions be "issued" in accordance with formal or informal rulemaking. The former argument is without merit, *Affinity Mining Company*, 5 IBMA 36, 48, 82 I.D. 362, 1975–1976 OSHD par. 19,880 (1975), but we agree with the latter, albeit for reasons not advanced by MESA.

We reject Bishop's argument based upon sec. 101 of the Act because, as we indicated in our earlier analysis of sec. 302(a) and the regulations promulgated in pursuance thereof, the Secretary merely exercises an "approval" function with respect to proposed roof control plans submitted to him. He has neither the power nor the obligation to issue, develop, promulgate, or revise existing plans. 30 U.S.C. § 811(a) (1970).

Insofar as sec. 301(d) is concerned, we agree that, under sec. 302(a), the Secretary is obliged to require that operators revise an existing roof control plan if changed circumstances or perceptions reveal such a necessity. However, he is not empowered to "prescribe" such revisions within the meaning of sec. 301(d) because, as we explained earlier, he cannot impose them *regardless* of operator disagreement. In other words and to repeat again, sec. 302(a) does not vest the Secretary with the power or obligation to issue or adopt revised roof control plans. The Secretary is limited to exercising an "approval" function and in applying statutory sanctions after due notice for the failure of an operator to take the necessary steps to adopt an appropriate revised plan and file the same for approval. Accordingly, we conclude that Bishop's reliance on this section, as a source of binding procedure for the Secretary with respect to revisions of existing roof control plans, is misplaced.

In sum, it is therefore the judgment of the Board that the subject withdrawal order charging a violation of the roof control plan cannot be invalidated because the Secretary failed to proceed in accordance with secs. 101 or 301 of the Act. Rather, such order can and should be vacated solely because it was predicated upon the violation of an alleged provision of the subject roof control plan which was never "adopted" by Bishop within the meaning of sec. 302(a) of the Act and 30 CFR 75.200 *et seq.*

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43

CFR 4.1(4)), IT IS HEREBY ORDERED that the initial decision in the above-captioned docket IS REVERSED and Order of Withdrawal 1 DCP, January 22, 1974, IS VACATED.

DAVID DOANE,
Chief Administrative Judge.

WE CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

JAMES R. RICHARDS,
Ex Officio Member of the Board.
Director,
Office of Hearings and Appeals.

APPENDIX A

MINE Id. No. 46-01400

UNITED STATES
DEPARTMENT OF THE INTERIOR
MINING ENFORCEMENT AND SAFETY ADMINISTRATION
MINIMUM ROOF-CONTROL PLAN

Permit Number 4-RC-9-70-1076-2

Date: October 25, 1973.
Mine: Bishop mine.
Company: Bishop Coal Company.
Location: McDowell County, West Virginia (Near Bishop, Tazewell County, Virginia).
Type(s) of roof-control plan(s): Full bolting, pillar recovery, spot bolting, and conventional.
Area(s) covered by this plan: All locations in first and second mining.
Coalbed being mined: Pocahontas Nos. 3 and 5 coalbeds.
Coalbed(s) being mined above or below present mining operations: This coalbed is being mined jointly in some areas. Pocahontas No. 5 coalbed is the top coalbed. Interval between coalbeds is approximately 135 feet.
Typical roof section:
Depth of cover over coalbed: 1,065 feet.

Main roof.
Sandstone of undetermine thickness.
Immediate roof 0 to 10' Stratified shale.
Coalbed 50'' Pocahontas No. 5 Coalbed.
Bottom 10' Shale and sandstone.

DRAWING

Sandstone.
0 to 10' Shale and sandstone.
0 to 12'' Coal and shale streaks.
37'' Pocahontas No. 3 coalbed.
10' Fire clay and shale.

Richard Baugh, Company Official Signature; title, Superintendent; date, October 26, 1973.

Roof-control investigator(s): Charles D. Hambric, Jr., and Joseph J. Filipek.

Approved by: J. M. Krese; title, District Manager; date, December 17, 1973.

APPENDIX B

GOV'T EXHIBIT NO. 3

TRANSMITTAL SHEET FOR COAL-MINE INSPECTION REPORT

Number of times inspected this calendar year. _____.

Company: Bishop Coal Company.

Mine: Bishop Mine.

Location: McDowell County, West Virginia (Near Bishop, Tazewell County, Virginia).

Inspection Dates: October 25, 1973.
Number of shifts spent inspecting: 2.
Number of hours to complete inspection (include haulage and roof-control course): 12.
Number of Air Samples: _____.
Number of Dust Samples: _____.
Date final report started: _____.
Hours to write: _____.
Date Completed: _____.

Annual Production: _____
Daily Production: _____
Daily Employment: Large.
Life of the mine: _____
Date Notice posted: _____
Date Previous Inspection: _____

Names and titles of company officials with whom recommendations were discussed: Richard Baugh, Supt., Clem Grindstaff, Mine Foreman.

Copies of report should be sent to: (Include highest operating official, usually President and Superintendent, and number of copies each receives) Robert Little, Safety Inspector, use previous mailing list.

Recording Secretary (Name and Address): _____

UMWA District No.: 29. Local Union No.: _____. Union affiliation previous inspection: _____.

Date Transmitted: _____, 19__.

CHARLES D. HAMBRIC, JR.,
Federal Coal-Mine Inspector.

ADMINISTRATIVE APPEAL OF W. J. B. GRAHAM AND WILLIAM S. GRAHAM

v.

AREA DIRECTOR B.I.A., BILLINGS, AND ALL OTHER INTERESTED PARTIES

4 IBIA 205

Decided *November 19, 1975*

Appeal from the decision of the Area Director, affirming the decision of the Superintendent, Crow Agency, Hardin, Montana, canceling certain leases involving allotted lands on the Crow reservation, Montana.

Affirmed.

1. Indian Lands: Leases and Permits: Farming and Grazing

The restricted allotment of any Indian may be leased for farming or grazing purposes by the allottee or his heirs, subject to the approval of the superintendent or other officer in charge of the reservation where the land is located, under such rules and regulations as the Secretary of the Interior may prescribe.

2. Indian Lands: Leases and Permits: Subleases, Assignments, Amendments, Encumbrances

A sublease, assignment, amendment or encumbrance of any lease may be made only with the approval of the Secretary and the written consent of all parties to such lease.

APPEARANCES: Bert W. Kronmiller, Esq., and James E. Seykora, Esq., counsel, for appellants, W. J. B. Graham and William S. Graham; Crowley Kilbourne, Haughey, Hanson & Gallagher by John Dietrich, Esq., for Gary Murphy, Administrator of the Estate of Maurice D. Murphy, Deceased; Edward L. Meredith, Esq., Field Solicitor's Office, Billings, Montana, for Superintendent, Crow Indian Agency, and Area Director, Billings Area Office, Bureau of Indian Affairs.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

This matter comes before the Board on an appeal from a decision of the Acting Area Director, Billings, Montana, dated April 2, 1974, affirming the decision of the Acting Superintendent, Crow Agency, Hardin, Montana, dated January 28, 1974, canceling certain leases (Contract Nos. 0–115, 0–116, 0–347, and 0–368) involving allotted lands on the Crow Reservation, Montana.

The matter was referred to Administrative Law Judge Frances C. Elge for a fact-finding hearing and recommended decision. A hearing was held at the Crow Agency, Montana, April 3 and May 21, 1975. The essential facts of the case are recited in the findings and recommended decision, p. 570 dated October 28, 1975.

The Administrative Law Judge found among other things that:

1. A sublease, assignment, amendment, or encumbrance of any of the leases may be made only with the approval of the Secretary of the Interior and the written consent of all parties to such lease as provided in 25 CFR 131.12(a).

2. The appellants entered into a

contract for a deed on July 10, 1973, with Lalon Fladager and Daryl Fladager, as purchasers; that on the next day, July 11, 1973, the Fladagers by an agreement assigned their interests in and to said contract for deed to Maurice D. Murphy. The leases in question were a part of the consideration for the purchase price set forth in the contract for deed.

3. Maurice D. Murphy first delivered livestock to the ranch premises, including the land covered by the aforementioned leases, on or about November 1, 1973.

4. Varying numbers of payments in varying amounts were accepted from the Maurice D. Murphy lease account by members of the Left-hand family.

The contention that the lessors acquiesced in the assignment of the leases by the acceptance of cash cannot be sustained. The acceptance of rentals by a lessor subsequent to default on specific provisions of a lease by a lessee does not constitute a waiver of items in default in the absence of a showing that the lessor voluntarily or intentially waived the requirements under the lease. *Sessions, Inc.* v. *Richard Amado Miguel (Lessor)*, 4 IBIA 84, 82 I.D. 331 (1975).

5. Custom and usage on the Crow Reservation for many years has been the practice "that insofar as office leases are concerned where there are numerous Indian lessors, heirship problems involved * * * the purchaser simply continues to make payments under the office leases and to demonstrate that the consent of the Indians is in fact given by such acceptance."

[1] & [2] The unauthorized practice does not validate the assignments for the reason that no Agency practice can abrogate Acts of Congress and regulations of the Secretary of the Interior promulgated under those Acts. *See* 25 U.S.C. § 393 (1970) and 25 CFR 131.12(a) referred to, *supra*.

The Judge issued findings and a recommended decision on October 28, 1975, affirming the Acting Area Director's decision for the reason that the leases were assigned contrary to a certain Federal Statute and Departmental Regulation referred to, *supra*, in that the appellants did not obtain the *written consent of each lessor* to such assignments and did not obtain the *approval of the Superintendent*, Crow Indian Agency, of such assignments. (Italics supplied.)

We hold that the preponderance of the evidence in the record supports the findings and recommended decision of the Administrative Law Judge. We adopt Judge Elge's decision hereto attached.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the appeal is hereby DISMISSED and the decision of the

Acting Area Director is AFFIRMED.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:
ALEXANDER H. WILSON,
Administrative Judge.

ADMINISTRATIVE LAW JUDGE, C/O BUREAU OF INDIAN AFFAIRS, BILLINGS, MONTANA 59101

FINDINGS AND RECOMMENDED DECISION

October 28, 1975

1. By memorandum of January 23, 1975, from Hon. L. K. Luoma, Chief Administrative Law Judge, Office of Hearings and Appeals, Arlington, Virginia, the undersigned was designated to hold a hearing and submit a recommended decision to the Board of Indian Appeals, in accordance with an order therefor issued on January 22, 1975, by Hon. David J. McKee, the then Chief Administrative Judge of said Board.

The Chief Administrative Judge defined the issues as:

> Did the appellant render the leases subject to cancellation by subleasing, assigning, amending, or encumbrancing said leases or other action contrary to the statute and regulations?
> Did the the parties to said leases acquiesce to the sublease, assignment, amendment, or encumbrance of such leases by accepting lease payments from persons other than the appellant-lessee or by any other action?

2. A prehearing conference was held in this matter on April 3, 1975, whereat it was disclosed that appellants would propose to introduce 21 exhibits and the respondent (Bureau of Indian Affairs), three. The documents were marked for identification as A–1 through A–21 and as R–1 through R–3. It was agreed by counsel for the respective parties that, prior to the taking of testimony, a stipulation could be prepared and entered into with respect to facts not in dispute and with respect to admission of exhibits.

3. A hearing was duly held at the Crow Indian Agency, Crow Agency, Montana, on May 21, 1975. Messrs. W. J. B. Graham and William S. Graham, hereinafter referred to as the appellants, were present in person and by counsel, Messrs. Bert W. Kronmiller and James E. Seykora, of Hardin, Montana. Mr. Gary M. Murphy, Administrator of the Estate of Maurice D. Murphy, Deceased, was present in person and by counsel, Messrs. John M. Dietrich and Richard E. McCann of Billings, Montana. The Superintendent, Crow Indiana Agency, and the Area Director, Billings Area Office, Bureau of Indian Affairs, were represented by Edward L. Meredith, Esq., of the Office of Field Solicitor, U.S. Department of the Interior, Billings, Montana. Also in attendance were some members of the Lefthand family: Frederick Lefthand, An-

thony Lefthand, Melvin Lefthand, and Ira Lefthand. Frederick Lefthand, the prime mover in this matter, acted as spokesman for the Lefthands.

4. The undated Stipulation, prepared pursuant to the understanding had at the prehearing conference, was executed by the parties at the May 21, 1975, hearing. Said stipulation is attached to the hearing transcript.

FACTS AND DISCUSSION

5. On Saturday, October 13, 1973, the appellants held a public auction at the ranch premises for the purpose of selling most of their personal property. The display advertisement thereof, published in the Hardin, Montana, newspaper on October 4, 1973, contained the statement, "OLD TIME RANCH HAS BEEN SOLD. THREE GENERATIONS OF ACCUMULATIONS WILL BE SOLD AT AUCTION." (Exhibit R–3.)

6. Fred Lefthand talked with Mr. W. J. B. Graham the morning of the auction, with respect to which Fred stated: "* * * At that time he indicated to me that he was leaving, that all he put in to that operation in Wyola, it took him seventy years, seventy and some odd years, and that his son was going to New Zealand, and that he was just leaving, and I told him that, I gave him my best regards and I said it was nice knowing him. I wished him luck and that was the extent of our conversation at that point."

7. In their ranching operations, the appellants had leased land from the Lefthands who were the beneficial owners of fractional shares in several allotments. Since the leases were of inherited trust lands owned by more than five competent heirs, they were subject to approval by the Superintendent, Crow Indian Agency, representing the Secretary of the Interior, as provided in 25 CFR 131.15, last sentence.

Leases between the appellants and the Lefthands, involved in this case are:

Contract No. O–115 for a period of five years beginning with October 1, 1972, covering 104 acres, more or less, of Crow allotment 1270—Medicinetail;

Contract No. O–116 for the same period as that in No. O–115, covering 139.2 acres, more or less, of Crow allotment 1277—Pretty Woman;

Contract No. O–347 for a period of five years beginning with December 1, 1973, covering 308.65 acres, more or less, or portions of Crow allotments 1270—Medicinetail Lefthand, and 1273—Peter Lefthand; and

Contract No. O–368 for the same period as that in No. O–347, covering 640 acres, more or less, of portions of Crow allotments 2837—Henry Lefthand, 2838—Fay Lefthand, and 3332—Rena Lefthand.

8. All of the leases were couched for direct payment of cash rental to "the heirs" of the respective original Allottees, in this case, the Lefthands.

9. In each lease it is recited that the contract is made and entered

into in accordance with the provisions of existing law and the regulations (25 CFR 131) "which by this reference are made a part hereof * * *." It is provided in 25 CFR 131.12(a) that a sublease, assignment, amendment, or encumbrance of any lease or permit issued under Part 131 may be made only with the approval of the Secretary and the written consent of all parties to such lease or permit, including the surety or sureties. The rule was spelled out in each lease as item 6. SUBLEASES AND ASSIGNMENTS, under the heading "This lease is subject to the following provisions."

10. On July 10, 1973, a contract for deed was entered into by the appellants as sellers and Lalon Fladager and Daryl Fladager, as purchasers; the next day, July 11, 1973, the Fladagers by an agreement assigned their interests in and to said contract for deed to Maurice D. Murphy of Scobey, Montana. Par. 2 of stipulation. Copy of said documents were admitted into evidence as Exhibit A-20. The Graham-Fladager contract for deed is attached to the Fladager-Murphy agreement as EXHIBIT "A". Indian leases, including those with the Lefthands, were clearly a part of the consideration for the purchase price set forth in said contract for deed. The third paragraph and the pertinent portion of the fourth paragraph thereof read:

> The sellers hereby agree to assign to the Purchaser all of the right, title and interest in and to the competent and non-competent leases of Indian allotted lands which are described in Exhibit "B", hereto annexed, and by reference hereby made a part of this Contract for Deed.
>
> Said Purchaser, in consideration of the premises, hereby agrees to pay said Sellers, as and for the purchase-price of said lands and premises and for the assignment of said Indian leases the amount of . . .

The last page of said EXHIBIT "B" contains the allotment numbers, the legal descriptions, and the acreages covered by Contracts 0–115, 0–116, 0–347, and 0–368, above outlined.

11. On page 6 of said contract for deed, it was provided:

> Notwithstanding any other provisions of this Contract for Deed, the Purchaser shall be entitled to the possession of the lands and premises herein sold and the lands and premises herein leased on November 1, 1973.

Maurice D. Murphy first delivered livestock to the ranch premises, including the land covered by said leases, on or about November 1, 1973. Par. 4 of stipulation; last par., p. 7, Appellant's Brief.

12. Maurice D. Murphy died on December 7, 1973. On December 20, a special administrator of his estate was appointed and was authorized to continue the ranching operations of the deceased; on January 17 the special administrator was appointed Administrator with the Will Annexed; that administrator was removed or resigned and on May 14, 1974, Gary M. Murphy was appointed Successor Administrator with the Will Annexed. From the time of the death of his father, Gary M. Murphy has been in possession

and control of the leased premises.

13. Varying numbers of payments in varying amounts were accepted from the Maurice D. Murphy lease account by members of the Lefthand family. Exhibits A–2, A–4, A–6, A–8, A–11. The earliest thereof was dated August 28, 1973; the latest, June 3, 1974. (Exhibit A–2.) Fred Lefthand accepted and cashed one check in the amount of $90, issued on November 20, 1973, by W. T. Shaw, Jr., agent for the Maurice D. Murphy lease account. (Exhibit A–6.)

14. At the May 21, 1975, hearing, counsel for Gary Murphy, Administrator of the Maurice D. Murphy Estate, cross-examined Fred Lefthand concerning his acceptance of the $90 check. The record thereof is (Tr. 57):

Q. What you are saying now is that in November of 1973 when you accepted the $90 check on the Maurice D. Murphy Lease Account, you were doing so to establish the foundation for this lawsuit.

A. That's right.

Q. Did you notify Mr. Graham or Mr. Murphy immediately with regard to the acceptance of that check, or Mr. Shaw?

A. After I received the check, my brother Anthony and I in December, we proceeded to Mr. Murphy's residence in Wyola. I think at that time if the approach was mutual coming from him, I think we would have considered, we would have considered something that would alleviate the problem. We had a cool reception that day and it automatically turned things off. So at that point we had, we didn't want to have any relationship with Mr. Murphy at that time.

15. On December 26, 1973, Fred Lefthand addressed a letter to the Superintendent, Crow Indian Agency, requesting that the Graham leases be canceled. Fred stated therein that, in October, Mr. (W. J. B.) Graham sold his entire operation and vacated the area; that subsequently the Graham operation was purchased by Maurice Murphy of Scobey, Montana; that Mr. Murphy died suddenly "about two weeks ago"; that he (Fred) had made several attempts through the Crow Agency Branch of Realty to put the new owner on notice to comply with the lease assignment provision contained in the original lease contracts; and that he and the other heirs had not given their consent for the lease to continue "to a fourth party * * * a son of the late Maurice Murphy by the name of Gary Murphy." The letter, as well as one dated December 27, 1973, from Fred Lefthand to the Superintendent, is in the record in the file labeled CONTR. 0–115.

16. On January 9, 1974, an unsigned letter was sent to the appellants by the Acting Superintendent, Crow Indian Agency, advising appellants that a written complaint had been filed with him stating that the appellants had sold or assigned the contracts involved in this case; calling appellants' attention to, and quoting the provisions of, item 6. SUBLEASES AND AS-

SIGNMENTS as contained in each lease. The letter concluded with:

> Inasmuch as you have not filed assignments as stipulated above, you have violated the terms of the contracts.
>
> In accordance with the provisions of the Code of Federal Regulations, Title 25, part 131.14, you are hereby allowed ten days from the date of receipt of this notice to show cause why your leases should not be cancelled.

17. By letter of January 14, 1974, to the Superintendent, the appellants, among other things, stated:

> * * * This is to advise you that we have not sub-leased, assigned or amended the leases referred to in the letter of January 9, 1974. In the event any leases are assigned we will, of course, present the matter of the assignment to the lessors named in the leases for their consent and approval and request the approval of the Superintendent of the Crow Indian Agency.

18. The Superintendent responded to the appellants on January 28, 1974, that

> Your letter stating that you did not sell or assign the contracts is not a satisfactory reply to our ten day show cause notice. In accordance with the provisions of the Code of Federal Regulations, Title 25, 131.14, you are notified that the contracts as listed are hereby cancelled.

He further advised the appellants of their right to appeal his decision.

19. On February 12, 1974, the appellants filed a petition for review of the Superintendent's decision of January 28, 1974. The petition was directed to the Billings Area Director, Bureau of Indian Affairs. In the petition, the appellants alleged that the Superintendent's action was arbitrary and capricious because it was apparently initiated solely on the basis of Frederick Lefthand's unverified letter of December 26, 1973; that, in sending the show cause letter of January 9, 1974, the Acting Superintendent acted solely on the Lefthand letter and assumed that there had been executed a written sublease, assignment, or amendment of such leases; that notwithstanding appellants' denial contained in their January 14, 1974, letter, appellants were not offered or afforded a hearing. The appellants then reiterated that no sublease, or assignment, or amendment of the lease contracts had been made by them to any third parties. For further details, see EXHIBIT D to appellants' Petition for Appeal to the Commissioner of Indian Affairs.

20. By letter of April 2, 1974, to appellants' attorney, Bert W. Kronmiller, Esq., the then Acting Assistant Area Director, Billings Area Office, Bureau of Indian Affairs, John R. White, concurred in the decision of the Superintendent, Crow Indian Agency, and denied the appeal. He advised appellants of their right to appeal his decision to the Commissioner of Indian Affairs.

21. The appellants filed a timely petition for appeal to the Commissioner of Indian Affairs. The appeal was referred to the Board of Indian Appeals for decision. The Board issued a Notice of Docketing on June 4, 1974. Frederick Lefthand filed an answer to the petition for appeal wherein the collateral issue of whether the leases had been

altered to provide for 5-year terms instead of 2- or 3-year terms was raised.

22. After the appellants filed a supplemental brief, countering Frederick Lefthand's answer to the petition, the matter was referred to the undersigned administrative law judge as hereinabove stated. Par. 1, *supra.*

23. Under the facts recited in paragraphs 10 and 11 hereof, an implied assignment of the leases was effected. The contractual obligation to assign the leases and the assumption of possession, use, and control of the leased premises by the late Maurice D. Murphy constitute such assignment. Absent restrictions in the leases and the regulations, as set forth in paragraph 9 hereof, such implied assignments would have been effective to form the basis for the running of covenants in the leases as to burden or benefit the assignee. 49 Am Jur 2d, Landlord and Tenant, § 397 (1970). *See also Abbott* v. *Bob's U-Drive*, 222 Ore. 147, 352 P. 2d 598, 81 ALR 2d 793, containing the above-cited rule and, further, holding that the occupation of leased premises by one other than the lessee and his payment of rent are sufficient to take the implied assignment out of the statute of frauds. Such assignment was contrary both to the regulations, promulgated by the Secretary of the Interior pursuant to statutory authority, 25 CFR Part 131 (1974), and the provisions of said leases. See paragraph 9 hereof. Statutory authority for said regulations are cited to Part 131 at page 185 of Title 25, Code of Federal Regulations (1974).

24. The appellants claimed that the lessors acquiesced to the sublease, assignment, amendment, or encumbrance of the leases in that "numerous Lessors received, accepted and cashed lease rental checks drawn on the Maurice D. Murphy Lease Account * * *" and that at the time of Maurice D. Murphy's death, December 7, 1973, "The Lessors had already approved of Murphy's presence by accepting money (lease payments) from Murphy." *See* appellants' brief, page 8. Such payments were made and accepted as outlined in paragraph 13 hereof. Most of the Lefthands acquiesced in the Murphy operation by acceptance of checks.

25. Frederick Lefthand accepted one check on November 20, 1973. He and his brother thereafter called upon Mr. Gary Murphy. Whatever transpired among the parties, Frederick Lefthand and his brother wanted no further dealings with Mr. Murphy. *See* paragraph 14 hereof. The general rule is that acceptance of rental by a lessor from an assignee of a lease constitutes acceptance thereof or acquiescence therein, but before such acquiescence can be imputed to the lessor, he is entitled to know under what arrangements one other than

the original lessee is in possession. In this case, that a contract for deed had been entered into between the Grahams and the Fladagers and that such contract for deed had been assigned by the Fladagers to the late Maurice D. Murphy remained a carefully guarded secret until the appellants filed their petition to appeal the matter to the Commissioner. The contention that Frederick Lefthand acquiesced in the assignment of the leases by the acceptance and the cashing of one check, in light of the facts considered as a whole, cannot be sustained. This conclusion is supported by the holding of the Board of Indian Appeals in the Administrative Appeal of *Sessions, Inc.* v. *Richard Amado Miguel (Lessor)*, 4 IBIA 84, 82 I.D. 331 (1975), that acceptance of rentals by a lessor subsequent to default on specific provisions of a lease by the lessee does not constitute waiver of items in default in the absence of a showing that the lessor voluntarily or intentionally waived the requirements under the lease.

26. Appellants contend that the set of circumstances reveals that a rapid series of events transpired that prevented Maurice D. Murphy and the Maurice D. Murphy Estate from successfully taking steps that are considered appropriate under the regulations to receive proper documentation of his use of the leases in question, recounting Murphy's entry into possession about November 1, 1973, the untimely death of Mr. Maurice D. Murphy, the difficulties of setting up a large cattle operation during the fall and winter months, the difficulty of tracking down lessors, and the complications of handling such matters in the Maurice D. Murphy Estate proceedings. But what of the months before the death of Maurice D. Murphy? The transactions whereby Murphy acquired possession and control of the leased lands were completed on July 11, 1973. Negotiations prior thereto had to have been completed some time before that. Whatever, for the Murphys to be lawfully in possession of the trust lands here involved, the appellants should have obtained the written consent of each of the lessors for an assignment of the leases to Maurice D. Murphy and the approval of the Superintendent, Crow Indian Agency, of such assignments.

27. In addition to the foregoing, the appellants cite custom and usage on the Crow Reservation to sustain their position: That for many years it has been the practice "that insofar as office leases are concerned where there are numerous Indian lessors, heirship problems involved, * * * the purchaser simply continues to make payments under the office leases and to demonstrate that the consent of the Indians is in fact given by such acceptance." The testimony that such a practice exists is uncontroverted. (Tr. 75.) Corroborative of the practice is a bill for collection dated 12/20/73 from the Bureau of Indian Affairs, Crow Indian Agency, addressed to Gary

Murphy, Wyola, Montana, for farming and grazing rentals due on Contracts #0–2901, #0–347, and #0–368. A xerox copy of the billing was attached to Frederick Lefthand's letter of December 27, 1973, to the Acting Superintendent, filed in the folder labeled CONTR. 0–115. The unauthorized practice does not validate the assignments for the reason that no Agency practice can abrogate Acts of Congress and regulations of the Secretary of the Interior promulgated under those Acts. *See* 25 U.S.C. § 393 (1970), and the regulations discussed in paragraph 9 hereof. In *Sessions, Inc.* v. *Morton*, 348 F. Supp. 694 (C.D. Cal. 1972), the Court commented on lack of action on the part of the Bureau of Indian Affairs, in connection with breaches of contract, as follows:

> * * * The delays of the Department of Interior through its Bureau of Indian Affairs, * * * raise serious questions of concern for Indian affairs which cannot be adequately answered within the framework of this litigation. The Department is charged with the responsibility of the management of its trust obligations in the best interest of Indian beneficiaries. This fiduciary duty carries with it—if not express—at least an implied requirement of diligence. The tripartite nature of Indian affairs—at least in the context of this case—points up the wisdom of review of those activities to assure that the exercise of these responsibilities remains sensitive to the desires—and more importantly to the needs of those our laws have been enacted to protect.

The comments apply equally to the practice at Crow Agency with respect to Leases included in contracts for deeds.

CONCLUSIONS

1. The appellants rendered the leases subject to cancellation by assigning them, contrary to the statutes and regulations, in that they did not obtain the written consent of each lessor to such assignments and they did not obtain the approval of the Superintendent, Crow Indian Agency, of such assignments.

2. Some of the lessors acquiesced in the transfer of possession of the property by accepting lease payments from persons other than the appellants-lessees. Frederick Lefthand and his brother Anthony Lefthand did not so acquiesce.

3. The collateral issue with respect to whether the leases should have provided 2 and 3-year terms instead of 5-year terms is moot in light of conclusions 1 and 2.

RECOMMENDATION

It is recommended that the decision issued by Acting Assistant Area Director John R. White, Billings Area Office, Bureau of Indian Affairs, be affirmed and that Lease Contracts 0–115, 0–116, 0–347, and 0–368 be deemed canceled as of January 28, 1974, the date of the letter from the Superintendent,

598–747—76——4

Crow Indian Agency, to the appellants, notifying them of cancellation of said leases.

Done at Browning, Montana, October 28, 1975.

FRANCES C. ELGE,
Administrative Law Judge.

ASHLAND MINING AND DEVELOPMENT COMPANY, INC.

5 IBMA 259

Decided *November 19, 1975*

Appeal by the Mining Enforcement and Safety Administration from that part of a decision by Administrative Law Judge Edmund M. Sweeney (Docket No. HOPE 75-19-P), dated May 5, 1975, refusing, in a civil penalty proceeding, to assess a penalty for a violation allegedly cited in an order of withdrawal and a modification thereof issued in pursuance of the enforcement of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed in result.

1. Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Sufficiency

Where neither an order nor modification thereof describes a condition or practice constituting an alleged violation of a mandatory safety or health standard as required by sec. 104(e) of the Act, an Administrative Law Judge is correct in vacating any proposed penalty assessment based on such inadequate notice. 30 U.S.C. § 814(e) (1970).

APPEARANCES: Richard V. Backley, Esq., and David Barbour, Esq., for appellant, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Procedural and Factual Background

On July 1, 1974, the Mining Enforcement and Safety Administration (MESA) filed a petition for assessment of civil penalties under sec. 109(a) of the Act (30 U.S.C. § 819(a) (1970)), against Ashland Mining and Development Company, Inc. (Ashland), respecting the latter's operation of its Sycamore Branch Strip Job located at Cinderella, West Virginia. The petition cited, *inter alia*, the subject Order of Withdrawal No. 1 THH issued on September 20, 1971, pursuant to sec. 104(a) of the Act (30 U.S.C. § 814(a) (1970)). Ashland failed to respond. Orders requiring Ashland to show cause why it should not be held in default pursuant to 43 CFR 4.544(a) were issued on October 10, 1974, and October 15, 1974. Again Ashland made no response. On December 2, 1974, MESA was requested to furnish available information, including proposed findings, applicable to the criteria to be considered in assessing a civil penalty under section 109(a) of the Act. MESA responded to the request on December 30, 1974. By Order of January 14, 1975, a prehearing conference was set for Feb-

ruary 18, 1975, and a hearing on the merits was set for February 19, 1975, if necessary. Mr. Charles Yates, the President of Ashland, received the Order on January 20, 1975, but Ashland entered no appearance at the prehearing conference. Accordingly, the matter was returned to a default status. The Administrative Law Judge (Judge) issued his decision on May 5, 1975, found no violation respecting Order of Withdrawal No. 1 THH, and vacated any assessments based upon said Order.

The pertinent factual background is as follows: On September 18, 1971, at approximately 8:15 a.m., a surface machinery accident occurred at Ashland's Sycamore Branch Strip Job resulting in the death of Joseph Bevins, grader operator; on September 19, 1971, MESA learned of this event through a local newspaper article; on September 20, 1971, MESA commenced an investigation by issuing Order of Withdrawal No. 1 THH pursuant to sec. 104(a) of the Act which reads— "This Order was issued pending an investigation of a fatal accident"— and designated the "entire operation" as the area from which persons must be withdrawn and prohibited from entering; on that same day, at approximately 10:30 a.m., the order was served upon Charles Yates, President of Ashland; and on September 22, 1971, the investigation was completed by MESA and a modification of the September 20th Order issued pursuant to section 104(g) of the Act. The modification contained the following language:

> The order was modified to include the following conditions: *the 14E Caterpillar grader* was damaged extensively as the result of the accident, and shall be restored to a condition of safe operation comparable to the original condition when received from the factory. This order was issued during the investigation of a fatal accident.

As part of its response to the Judge's Order to Furnish Information, MESA provided a copy of a report entitled "Report of Fatal Surface Machinery Accident, Sycamore Branch Strip Job, Ashland Mining and Development Company, Cinderella, Mingo County, West Virginia" (report). This report detailing the circumstances of that event was prepared by federal inspectors, and albeit undated, was issued subsequent to September 20, 1971, the date of the Order at issue. It concludes with a list of notices and orders specifying alleged violations found during the inspection conducted September 20–22, 1971. With respect to the order in issue, the report (page six) states as follows:

Imminent Danger—Section 104(a)

> This Order was issued pending an investigation of a fatal accident.

Action taken

> Order No. 1 was issued September 20, 1971, on Form 104(a), requiring that all persons, except persons referred to in Section 104(d), be withdrawn and prohibited from entering the entire operation.

The mandatory safety standard alleged to be violated is 30 CFR

77.404, which provides in relevant part as follows:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The Judge found that the Order issued pursuant to section 104(a) of the Act was wanting in two respects: (1) it did not describe a practice or condition which might constitute an imminent danger nor recite that a mine inspection and concomitant designation of an imminent danger area had been made; and (2) it failed on its face to state a violation of the Act or the regulations promulgated thereunder. The Judge further found that the Order was invalid predicated on the fact that it was issued *before* the mine inspection and determination of any imminent danger area—procedural steps which the Act expressly prescribes must precede the issuance of a valid 104(a) order. 30 U.S.C. § 814(a) (1970). The Judge concluded that the omission in the Order itself of either an expressed violation or imminent danger condition provided no legal source from which a penalty assessment could be derived. The Judge further determined in substance that MESA could not rely on a modification of an order to correct the imperfections contained in the initial order.

Contentions of MESA

MESA contends that a withdrawal order's validity is not at issue in a sec. 109(a) proceeding and is not determinative of the existence of an alleged violation. Secondly, it argues that an Administrative Law Judge may look to a subsequent modification of an order to find a violation of a mandatory health or safety standard, if the initial order fails to describe such violation. Finally, it contends that the Judge erred in not finding a violation of 30 CFR 77.404 and assessing a civil penalty therefor.

Issue Presented

Whether the original order, Order of Withdrawal No. 1 THH, as modified by the subsequent 104 (g) order, gave sufficient notice to the operator of a violation of a mandatory safety standard to justify the imposition of a civil penalty therefor.

Discussion

The Board is in accord with MESA as to its first and second contentions. With respect to the first, as previously set forth in *Eastern Associated Coal Corporation*, 1 IBMA 233, 236, 79 I.D. 723, 1971–1973 OSHD par. 15,388 (1972), the Board has held that the validity of a withdrawal order which contains an alleged violation is irrelevant in a 109 proceeding to a finding that the violation did obtain. With respect to the second, we believe that a legitimate function of sec. 104(g) of the Act is to permit inspectors to modify an order so

that the condition or practice constituting a violation may be properly described. Accordingly, we conclude that an Administrative Law Judge *may* look to a modification of an order to determine whether the condition or practice cited therein constitutes a violation of a mandatory health or safety standard.

[1] Notwithstanding the above, the Board takes note of sec. 104(e) of the Act which reads in pertinent part:

> Notices and orders issued pursuant to this section shall contain a detailed description of the conditions or practices which cause and constitute an imminent danger or a violation of any mandatory health or safety standard * * *.

30 U.S.C. § 814(e) (1970).

The language of the subject order and modification thereof has led the Board to conclude that: (1) the initial Order makes no mention of a violation; (2) the Modified Order is a directive to the operator and does not describe a violation of 30 CFR 77.404; (3) in combination, the order and its modification fail to describe a violation; and (4) the accident report can only be used in support of, and not in lieu of, an appropriate notice of violation. Based upon the foregoing, we conclude that no violation was appropriately described in the subject order or the modification thereof. *See* 5 U.S.C. § 554(b)(3) (1970). Accordingly, we conclude that the Judge's decision must be affirmed in result.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision of May 5, 1975, IS AFFIRMED and penalties assessed in the amount of $2,055 shall be paid by Ashland Mining and Development Company, Inc. on or before thirty (30) days of this decision.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:
HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

ROBBINS COAL COMPANY

5 IBMA 268

Decided *November 20, 1975*

Appeal by the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge Franklin P. Michels (Docket No. BARB 74-716-P), dated May 23, 1975, vacating a notice of violation in a civil penalty proceeding brought pursuant to sec. 109 of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

1. Federal Coal Mine Health and Safety Act of 1969: Unavailability of Equipment, Materials, or Qualified Technicians: Sufficiency

The fact that equipment required to abate a condition is on order, standing alone, will not support a conclusion of unavailability of that equipment.

APPEARANCES: Thomas A. Mascolino, Assistant Solicitor, and David Barbour, Trial Attorney, for appellant, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

The subject of this appeal is a notice of violation No. 3 FJ, issued on October 30, 1973, by Frank June, a duly authorized inspector of the Mining Enforcement and Safety Administration (MESA), in the No. 1 Mine of Robbins Coal Company (Robbins) located at Trafford, Alabama. The notice, which cited a violation of 30 CFR 75.1600, described the violative condition as follows:

> Communication facilities was [sic] inoperative between the surface and the working section.

On November 2, 1973, the inspector issued a Notice of Abatement which terminated Notice No. 3 FJ. It states that "a new phone was installed on the communication system."

MESA filed a petition for assessment of civil penalty against Robbins on March 3, 1974, charging it with the above violation pursuant to sec. 109(a) of the Act. 30 U.S.C. § 819(a) (1970). When Robbins failed to respond thereto, it was ordered to show cause on July 15, 1974, why it should not be held in default and the matter disposed of in accordance with 43 CFR 4.544(a). Robbins failed to respond to the Order to Show Cause. On November 5, 1974, the Administrative Law Judge (Judge) ordered MESA to provide all available information, including proposed findings, so that he might summarily dispose of the case. On November 20, 1974, MESA responded to the Judge's request and included under the heading of "negligence" the following statements: "The operator knew the violation existed because he had placed an order for the material to abate it. Therefore, he was not negligent." The Judge rendered a one-page decision on May 23, 1975, vacating the only notice of violation alleged by MESA in its petition—Notice No. 3 FJ. His decision reads in pertinent part:

> * * * prior to the issuance of the violation, the operator had placed an order for the equipment necessary to abate the violation, but had not received same because of factors beyond his control. In view of the unavailability of the necessary equipment, no violation of a mandatory standard is found. *Itmann Coal Co.*, 4 IBMA 61, 69 [81 I.D. 96, 1974–1975 OSHD par. 19,427] (1975). * * *

The language of 30 CFR 75.1600 is identical with the language of section 316 of the Act (30 U.S.C. § 876 (1970)) which reads:

Telephone service or equivalent two-way communication facilities, approved by the Secretary or his authorized representative, shall be provided between the surface and each landing of main shafts and slopes and between the surface and each working section of any coal mine that is more than one hundred feet from a portal.

MESA's Contentions

MESA contends in substance that a mere showing that equipment is on order at the time of the issuance of a notice is not synonymous with equipment being unavailable and does not establish a valid defense; that the burden is on the operator, when alleging the unavailability of equipment, to show that the required equipment is not available on the market; and that since Robbins made no appearance nor introduced any evidence in its defense, the record does not indicate that the necessary telephone was not on the market nor that factors beyond Robbins' control prevented Robbins from receiving it. It further contends that the fact that the violation was abated in 2 days is persuasive evidence that the telephone *was* readily available on the market.

Issue Presented

Whether the Administrative Law Judge erred in concluding that a violation of 30 CFR 75.1600 did not occur and in vacating the subject notice.

Discussion

The Board has previously held "* * * that Congress did not intend that * * * a civil penalty (be) assessed where compliance with a mandatory health or safety standard is impossible due to unavailability of equipment, materials, or qualified technicians." *Buffalo Mining Company*, 2 IBMA 226, 259, 80 I.D. 630, 644, 1973–1974 OSHD par. 16,618 (1973). This principle was applied in *Associated Drilling, Inc.*, 3 IBMA 164, 81 I.D. 285, 1973–1974 OSHD par. 17,813 (1974), and again in *Itmann Coal Company*, *supra* at 62, 82 I.D. 96 (1975). In each of these penalty cases, the record indicated that the required material was unavailable to the mining industry in general.

The Judge concluded in this case that the telephone instrument was unavailable based solely upon the fact that it was on order. There is a singular lack of evidence showing when it was ordered, general availability in the market, or any effort by the operator to obtain the instrument other than by placing the order. There is no evidence whatsoever in this record to support the finding that the operator had not received the equipment "because of factors beyond his control." As stated by MESA in its brief:

* * * To excuse an operator because required materials have been ordered but not delivered—where such materials are

available—is to excuse an operator from its obligation to keep replacement materials on hand or to have them immediately available so as to maintain a continuance of the high degree of safety compliance which the law establishes. * * * (Brief, p. 3).

The defense of unavailability as set out in *Buffalo* is predicated upon a finding in the record of either the nonmanufacture of the equipment or its unavailability or scarcity in the market in general. This principle was applied in *Lucas Coal Company, et al.*,[1] 3 IBMA 258, 268, 81 I.D. 430, 1973–1974 OSHD par. 18,226 (1974), in which the record evidence did not show that adequate backup alarms were unavailable. There we ruled that the operator had not borne his burden of proof and failed to show by a preponderance of the evidence that the alarms were unavailable on the market. In the instant proceeding, the record is devoid of any evidence which indicates at the time of the issuance of the Notice either the general unavailability on the market, or scarcity, of telephone instruments.

[1] Accordingly, we conclude that the fact that the telephone instrument was on order, standing alone, is insufficient evidence upon which to base a conclusion of unavailability.

[1] *Aff'd sub nom Lucas Coal Company, et al. v. Interior Board of Mine Operations Appeals*, —— F. 2d —— (3d Cir. August 29, 1975).

Since Robbins was found to be in default, the Board assumes and finds that the subject violation did occur. 43 CFR 4.544(a).

In lieu of a remand, the Board may make the required findings of fact to coincide with the record evidence regarding any of the six criteria of sec. 109(a). *Buffalo Mining Company, supra* at 230. Accordingly, the Board finds that: (1) Robbins employs 20 persons with a production of 40 tons of coal daily and 8,000 tons annually; (2) the history of its previous violations is insubstantial; (3) its ability to stay in business will not be affected by the civil penalties assessed; and (4) it exhibited good faith in abating the violation. We further find that Robbins was not negligent as its knowledge and attempted abatement of the violation were manifest in its ordering the requisite telephone prior to the issuance of the Notice and that the violation was nonserious since the only working section affected thereby was located 5 minutes from the surface. Based upon the foregoing findings, we conclude that an appropriate penalty assessment for such violation is $50.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's deci-

sion and order vacating Notice of Violation No. 3 FJ, October 30, 1973, in the above-captioned case IS REVERSED; that said Notice IS REINSTATED; and that Robbins Coal Company pay a civil penalty in the amount of $50 within 30 days from the date of this decision.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:
HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

ADMINISTRATIVE APPEAL OF SALLY ANN PANKRATZ AND AURELIA SPENCER

v.

SUPERINTENDENT, FORT BELKNAP AGENCY; AREA DIRECTOR, BILLINGS AREA OFFICE; FORT BELKNAP COMMUNITY COUNCIL; AND ARNOLD ALLEN

4 IBIA 231

Decided *November 26, 1975*

Appeal from an administrative decision granting allocation of grazing privileges.

AFFIRMED.

1. Indian Lands: Leases and Permits: Grazing: Allocation: Generally

A tribal governing body may authorize the allocation of grazing privileges for tribal and tribally controlled government land to Indian corporations, Indian associations, and adult tribal members.

2. Indian Lands: Leases and Permits: Grazing: Revocation or Cancellation

The Superintendent may revoke or withdraw all or any part of a grazing permit by cancellation or modification on 180 days written notice for allocated Indian use.

APPEARANCES: John P. Moore, Attorney at Law, for appellants, Sally Ann Pankratz and Aurelia Spencer.

OPINION BY ADMINISTRATIVE JUDGE WILSON

INTERIOR BOARD OF INDIAN APPEALS

The above-entitled matter comes before this Board on an appeal filed by Sally Ann Pankratz and Aurelia Spencer, through their counsel, John P. Moore, from a decision of the Area Director, Bureau of Indian Affairs, Billings, Montana, dated January 20, 1975. The Area Director's decision sustained the action of the Superintendent, Fort Belknap Agency, in allocating grazing privileges on tribally controlled lands on or near the Fort Belknap Reservation to Arnold Allen.

The record indicates the following chain of events leading up to the appeal herein.

Range Unit No. 150 was advertised for a 5-year period on April 11, 1974, comprising approximately

9,214 acres with a carrying capacity of 1,842 AUMs or 307 head of livestock. The advertisement was made under the authority of 25 CFR 151 and Fort Belknap Community Council Resolution No. 1–74.

The only bid received for Range Unit No. 150 was submitted by Sally Ann Pankratz. Accordingly, Range Unit No. 150 was awarded to her under H. Eighth preference of the advertisement. Pursuant thereto grazing permit No. 150 (Contract No. 14–20–0255–1657) was issued to Sally Ann Pankratz for a 5-year period beginning January 1, 1974, and terminating not later than December 31, 1978, specifying specifically the grazing season to be from May 15 through November 15 of each year thereunder.

[1] Arnold Allen, prior to the deadline of November 15, 1974, subsequently postponed to November 18, 1974, at the request of the tribal council, requested allocation on Range Unit No. 150. Allocation was allowed thereon November 19, 1974, by Resolution No. 121–74 pursuant to Section II, Fort Belknap Community Council Resolution No. 1–74 and 25 CFR 151.10. The Fort Belknap Community Council, by virtue of its Charter, Constitution and By-Laws approved by the Secretary of the Interior, is vested with full power and authority to make and perform contracts and agreements of every description including the authorization of allocating grazing privileges.

On December 19, 1974, Sally Ann Pankratz was notified by certified mail, receipt No. 151681, that Arnold Allen's allocation into Range Unit No. 150 had been approved. Mrs. Pankratz thereafter on December 24, 1974, submitted a request to the Superintendent, Fort Belknap Agency, to assign grazing permit No. 150 to Aurelia Spencer. The Superintendent, by certified mail dated January 7, 1975, advised Mrs. Pankratz that her request for assignment of Range Unit No. 150 to Aurelia Spencer could not be approved since the unit in question had already been allocated to Arnold Allen. By the same letter the Superintendent advised Sally Ann Pankratz that Range Unit No. 150 had been awarded to her under H. Eighth preference of the grazing resolution, therefore making her permit subject to allocation.

Under date of January 9, 1975, Sally Ann Pankratz, by letter, advised the Superintendent, Fort Belknap Agency, that she was appealing his decision of January 7, 1975. Her letter of January 9, 1975, gave the following reasons for the appeal:

> I am appealing the allocation of range unit 150 of Ft. Belknap Indian Reservation to Arnold Allen. Cattle belonging to Aurelia Spencer, who is an enrolled member of Ft. Belknap, has been uning (sic) this unit. Mrs. Spencers' cattle are run with ours as a ranch unit. This range unit is very important to the whole

ranch operation. There is deeded land scattered through range unit 150. This range unit is off the reservation and consists mostly of submarginal land. The grazing permit for range unit 150 was awarded to me for five years in 1974.

Mrs. Spencer now has 300 head of cattle to almost fill the capacity of this range unit. Mrs. Spencer's brand is on the grazing permit as well as my brand. These cattle are Mrs. Spencer's main source of income for herself and family.

I feel this allocation would push off Indian owned cattle with no available grazing for them.

Aurelia Spencer on January 13, 1975, by letter advised the Superintendent, Fort Belknap Agency, that she also was appealing his decision of January 7, 1975, regarding the allocation of Range Unit No. 150 to Arnold Allen. In her letter of January 13, 1975, to the Superintendent she stated:

I am appealing to allocation of range unit 150 of Fort Belknap Indian Reservation to Arnold Allen Cattle belonging to me, which I am enrolled as a member of Fort Belknap, and have been using this unit. My cattle will be on this unit along with Sally Pankratz, this range unit is very important to the whole ranch operation. There is deeded land scattered through range unit 150. This range unit is off the reservation and consists mostly of submarginal land. The grazing permit for range unit 150 was awarded me for five (5) years in 1974.

I have 300 head of cattle to almost fill the capacity of this range unit, and have had for five (5) years. My brand is on the grazing permit and these cattle are my main source of income for myself & family.

I believe the above is self-explanatory and would like some action on this as soon as possible.

James A. Canan, Area Director, Billings Area Office, Billings, Montana, in denying Sally Ann Pankratz's appeal stated as follows:

This is in further reply to your letter dated January 9, 1975 appealing the decision of the Superintendent to allocate Range Unit No. 150, on the Fort Belknap Reservation, to Mr. Arnold Allen.

Your written petition, supporting documents, and the Superintendent's evaluation have been received and reviewed by this office.

Under the terms of Fort Belknap Community Council Resolution No. 1–74, dated February 1, 1974, and the Code of Federal Regulations, Title 25—Indians, Chapter 1, Part 151.15(c) the Superintendent may revoke or withdraw all or any part of a grazing permit by cancellation or modification for allocated Indian use. Resolution No. 121–74, dated November 19, 1974 allocated Range Unit No. 150 to Mr. Arnold Allen for 307 head of cattle. You were notified of this decision by Certified Mail dated December 19, 1974. Regulations requiring 180 days written notice be given have been complied with and will expire May 17, 1975.

By Certified Mail dated January 7, 1975, the Superintendent advised you that your request for assignment of Range Unit No. 150 to Mrs. Aurelia Spencer had been disapproved. The established deadline for approval of allocations, as mutually agreed upon by the Superintendent and Chairman, Fort Belknap Community

Council, was set for November 19, 1974. Your request for assignment was submitted December 24, 1974—after the range unit was allocated to Mr. Allen.

Tribal Resolution No. 1–74 and the Code of Federal Regulations provide for the acquisition of rangeland when it is needed for a bona fide Indian livestock operation. We suggest Mrs. Spencer contact the Agency Superintendent and Community Council to request an allocation of grazing privileges. She should be prepared to provide adequate proof of her ownership of the livestock to be grazed and a "share livestock contract" approved by the Fort Belknap Community Council. Allocations will be approved by joint action and approval of the Fort Belknap Community Council and the Agency Superintendent.

Following our review of all documents relative to your appeal we find the Superintendent has complied with the provisions of the Grazing Resolution and the Code of Federal Regulations. The Superintendent's decision is therefore sustained and your appeal denied.

* * * * *

It is from the foregoing decision that the appeal has been taken to this Board. Sally Ann Pankratz and Aurelia Spencer in their appeal of January 29, 1975, stated:

The basis for this appeal is the fact that the undersigned are properly qualified to have and hold the grazing permit on the above Range Unit No. 150, and they have been wrongfully deprived thereof.

Before addressing the basis for the appeal, we find it necessary to determine what interest, if any, Aurelia Spencer has in this appeal. An examination of the bid for grazing privileges dated April 18, 1974, clearly shows that Aurelia Spencer was not a co-bidder with Sally Ann Pankratz. Morever, the grazing permit issued on Range Unit No. 150 pursuant to the advertisement contains only the name of Sally Ann Pankratz and no mention is made therein of Aurelia Spencer as a co-permittee. Aurelia Spencer is first mentioned in Sally Ann Pankratz's letter of December 24, 1974, to the Superintendent, Fort Belknap Agency, wherein she makes mention that she was assigning the lease [sic] to her because her cattle use this lease. [sic] Further mention is made of Aurelia Spencer in Sally Ann Pankratz's appeal to the Area Director on January 9, 1975, to the effect that cattle belonging to Aurelia Spencer, who is an enrolled member of Fort Belknap, have been using this unit. The record indicates that some sort of an oral agreement existed between Sally Ann Pankratz and her sister, Aurelia Spencer, on Range Unit No. 150. However, the record clearly indicates that the purported agreement was never approved by the Superintendent or the Fort Belknap Community Council. Regarding Aurelia Spencer's interest in this appeal, the Acting Area Director, in his letter of April 15, 1975, to this Board advised:

* * * As a technical matter, we do not object to Mrs. Spencer entering an appeal in her own right as an "interested party." We do object to her joining Mrs.

Pankratz as an appellant herein because she was, as stated, a stranger to the case until after the decision complained of was made and the parties notified. That date was December 19, 1974 and the attempted assignment was not made until December 24, 1974. Had Mrs. Spencer bid on the unit as a tribal member and had she stipulated the share/lease contract with her sister the outcome could have been different. The fact is she did not.

* * * * *

Concerning the foregoing factors, the Board concludes that Aurelia Spencer is not a party in interest in the appeal herein notwithstanding the fact her name appears in the case. Having disposed of Aurelia Spencer's interest in the matter, we may now turn to the merits of Sally Ann Pankratz's appeal.

Notwithstanding the numerous contentions set forth in appellants' brief of April 30, 1975, of which the Board takes note, the only issue to be determined and resolved in this appeal is as follows:

Was Range Unit No. 150 as awarded to Sally Ann Pankratz subject to allocation and, if so, was the allocation properly made?

The record clearly indicates Sally Ann Pankratz was awarded Range Unit No. 150 for grazing livestock under H. eighth preference, which is the preference for running non-Indian livestock. Under the terms of Fort Belknap Community Council Resolution No. 1–74, Range Unit No. 150 was eligible for allocation. Accordingly, the Board finds that Sally Ann Pankratz's Range Unit No. 150 was eligible for allocation for Indian use.

[2] Arnold Allen's request for allocation in Range Unit No. 150 was made prior to the deadline established for allocations. On November 19, 1974, Arnold Allen was allowed to allocate into this unit in accordance with Fort Belknap Community Council Resolution No. 121–74. Pursuant to said resolution, the Superintendent under authority of 151.15(c) withdrew and allocated to Arnold Allen Range Unit No. 150 for 307 head of cattle upon 180 days written notice as required by the regulations.

The Board having found that the range unit in question was eligible or subject to allocation and was properly carried out, we find it unnecessary to consider at this time the other contentions set forth in the brief filed in support of the appeal.

In view of the findings hereinabove set forth, the Area Director's decision of January 20, 1975, sustaining the Superintendent's decision of January 7, 1975, allocating Range Unit No. 150 to Arnold Allen should be affirmed and the appeal dismissed.

NOW, THEREFORE, pursuant to the authority delegated to the

Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1(2), the decision of the Area Director, Billings, Montana, sustaining the decision of the Superintendent, Fort Belknap Agency, dated January 7, 1975, be and the same is hereby AFFIRMED and the appeal DISMISSED.

This decision is final for the Department.

ALEXANDER H. WILSON,
Administrative Judge.

I CONCUR:

MITCHELL J. SABAGH,
Administrative Judge.

APPEAL OF INTER*HELO, INC.

IBCA–713–5–68 (Ct. Cl. No. 54–74)

Decided *December 1, 1975*

Contract No. 14–08–0001–11015, Helicopter Operations—Arizona, Idaho, Oregon, Washington, California and Nevada, Geological Survey.

Denied.

1. Contracts: Construction and Operation: General Rules of Construction—Evidence: Generally

An appeal before the Board on remand from the Court of Claims with instructions to admit evidence, previously excluded under the parol evidence rule, for the purpose of showing a pre-award agreement or an express or implied concession as to the rate of use of helicopter services, is denied where the record, augmented as the Court directed, shows that the Government did not change its method of contracting at appellant's request but rejected the proposal to include a guaranteed minimum daily rate of use and where an internal memorandum from appellant's president shows that he understood at the time of award that the contract could be flown at the rate of 5 hours per day rather than the rate of 7 hours per day alleged later when the contract proved unprofitable.

APPEARANCES: Mr. Paul C. Valentine, Attorney at Law, Spaeth, Blase, Valentine & Klein, Palo Alto, California, for appellant; Messrs. John S. McMunn and E. Edward Wiles, Department Counsel, for the Government.

OPINION BY ADMINISTRATIVE JUDGE PACKWOOD

INTERIOR BOARD OF CONTRACT APPEALS

This appeal has been remanded to the Board from the United States Court of Claims in an action therein, No. 54–74, arising from the Board's denial of an equitable adjustment for an alleged failure on the part of the Government to order helicopter services at the rate called for in the contract.[1]

Based on two decisions by the Court of Claims, rendered after the Board's original opinions, the Court concluded that the Board erred in excluding from consideration, under the parol evidence rule, certain documents offered by appellant for the purpose of showing a pre-award agreement, or an express or implied concession as to rate of use of helicopter services.[2]

The Court expressed no opinion whether the record, enlarged as it deemed necessary, would show en-

[1] Court of Claims No. 54–74 is entitled *John Billmeyer, Trustee in Bankruptcy of the Estate of Inter-Helo, Inc* v. *United States.* The appeal before the Board is styled *Appeal of Inter*Helo, Inc.* The Board's original decision of December 30, 1969, IBCA–713–5–68, is reported at 69–2 BCA par. 8034, on reconsideration, April 24, 1970, 70–1 BCA par. 8264.

[2] The Court of Claims order cites *Sylvania Elec. Products, Inc.* v. *United States,* 198 Ct. Cl. 106 (1972), and *Macke Co.* v. *United States,* 199 Ct. Cl. 552 (1972), for the proposition that oral discussions at pre-award conferences and the practice of the parties during performance may be considered to resolve ambiguity in a contract or to supplement it with additional terms. In *Sylvania,* the contract resulted from a two-step procurement involving negotiation of the first step and advertising of the second step. The *Macke* contract resulted from a negotiated procurement. The Inter*Helo contract resulted from a formally advertised invitation for bids, which procedure does not afford bidders an opportunity to negotiate the terms of the contract.

titlement to additional compensation.[3]

At the request of appellant, a further hearing was held in San Francisco, California, on September 12, 1975. At the hearing, the documents excluded from the Board's previous consideration were admitted into evidence. The Board also received additional documents and further testimony from the president of Inter*Helo which were offered for the purpose of showing his understanding of the number of hours of helicopter service that would be ordered by the Government pursuant to the contract.

Findings of Fact

[1] The primary piece of evidence on which appellant relies to show the Government's intentions with respect to the number of hours to be flown is a planning chart which sets forth the helicopter services contemplated by the Geological Survey for its operations during the period from June 1967 through June 1968.[4] A copy of the planning document was given to Inter*Helo's president on or about July 20, 1967, at a discussion held in response to his hand-delivered letter of that date[5] complaining that Inter*Helo needed to average just under 7 hours daily on a then-current contract at the hourly price therein in order to cover its fixed costs and operating costs, while the daily average of hours flown since the start of that contract was 5.2 hours per day.[6]

The column on the extreme left of the planning chart is headed "Date." It contains the months from June 1967 through June 1968, and is further broken down by weeks. Immediately to the right of the date column is a heading entitled "Hours per day" under which appears an hour scale from one through ten. The blocks of time for various planned survey projects extend along the vertical scale in weeks and along the horizontal scale in hours per day.

The first project listed on the chart is the Ft. Apache project which was planned for a total of 90 hours at a rate of 7 hours per day during the period from June 19, 1967, to July 9, 1967. To the right of the chart, under the heading "Actual," the Ft. Apache project is shown to have been completed with a total of 90:35 hours at a total contract price of $13,315.75.[7]

The next block of time on the planning chart shows the Wells

[3] The documents excluded from the Board's consideration were Appellant's Exhibits A and B and a planning chart, Document "XY" which were part of the record before the Board and were in the record certified to the Court of Claims.

[4] The planning chart which appeared in the Board's record as Document "XY" was admitted as Appellant's Exhibit H at the hearing on September 12, 1975.

[5] Tr. II 14. References herein to the transcript of the hearing on September 12, 1975, are designated Tr. II, while references to the hearing on March 14, 1969, appear as Tr. I.

[6] Appellant's Exhibit G, letter of July 20, 1967, from Inter*Helo to the Geological Survey.

[7] The author of the planning chart testified that it was accurate only with respect to the Fort Apache project. Tr. II 50.

project planned for 120 hours with 40 hours planned at Warm Springs, both at 7 hours per day, during the period from about July 12 to August 6, 1967. These two projects were the subject matter of Inter*Helo's letter of July 20 which discusses movement of aircraft and personnel from Wells to Warm Springs and the hope that progress would be more rapid at Warm Springs (Appellant's Exhibit G).

Beginning with August 13, 1967, the column on the left of the chart shows planning for 855 hours of helicopter services at five different locations: Sand Point, 150 hours at 10 hours per day; Warm Springs, 430 hours at 10 hours per day; Rock Point, 175 hours at 6 hours per day; Priest Valley, 80 hours at 8 hours per day; and Coolidge Dam, 20 hours at 8 hours per day. The figures 80 and 20 are crossed out on the chart by pencilled X's. The 430 hours indicated on the chart for the Warm Springs project is marked out with a pencilled line and the figure 200 in pencil appears directly below. This reduction in hours allocated to Warm Springs could indicate a reduction either in hours per day or in the length of performance time, but there are no further notations on the chart to indicate which alternative was contemplated.

In addition to the five blocks of time in the left-hand column, there is another block of time to the right which does not appear under the scale for hours per day, but is under a heading designated "Sep. Contracts." This block of time is for 375 hours for Hailey and French Glen during the period of 67 work days from July 30 to October 31, 1967. The total number of hours divided by the performance time indicates a daily requirement for 5.6 hours. If the width of the block were drawn to the same scale as the blocks in the left-hand column, a daily use of 6 hours is indicated. The figure 375 is circled several times in ink. The figure 170 appears in ink beside an inked circle around Hailey and again in ink below the original figure 375. Inked lines near the top of the block and below the bottom of the block, together with a dotted line and arrows indicate a change in performance time to the period from August 15 to November 30, 1967. This increase in performance time indicates a contemplated daily rate of approximately 5 hours per day. The pencilled addition of the two 170 figures to yield a sum of 340, which appears near the line drawn at the end of the performance period, may indicate a reduction of 35 hours in the planned hours and would reduce the daily rate even further to less than 5 hours per day.

It should be noted that the letter (Appellant's Exhibit G) which formed the basis for the discussion at which appellant's president obtained a copy of the planning chart, did not allege that the Government was obligated to order helicopter services at the rate of 7 hours per day, but merely stated that it was necessary for Inter*Helo to achieve

that rate to cover its expenses. Of even greater significance is the testimony of Inter*Helo's president that he proposed a minimum guarantee per day, stated in terms of "X" number of helicopter hours and not as 7 hours or any other definite number. The proposal was rejected by the Government and Inter*Helo's president was advised that the Government would continue to use the same formula as it had in the past without revising its procurement methods.[8] The formula used in the contract under consideration was to state a minimum guaranteed number of hours and a minimum performance time as well as a maximum number of hours and a maximum number of days to which the performance time could be extended by the Government.[9]

In view of the fact that the planning chart contains no indication of any planning for any project at the rate of 7 hours per day after July 1967, as alleged by Inter*Helo, and in view of the Government's rejection of Inter*Helo's proposal to include a minimum daily guarantee in future contracts, the Board finds that Inter*Helo had no reasonable basis for an expectation that there would be a minimum daily rate of 7 hours per day in any future contract.

There remains the question of the rate that can be derived from the terms of the invitation for bids on which, as modified, the contract was based. The invitation for bids was issued on September 18, 1967, calling for a minimum of 525 hours of helicopter service at eight locations in a minimum performance time of

[8] Testimony of the president of Inter*Helo, Tr. II 14–15:

"A. Mr. Eckhardt was directly responsible for supervising the field operations on this particular type of survey work with the helicopters.

"Mr. Thurston was the Pacific Region Manager of the entire U.S.G.S. operation in Menlo Park.

"There had been a meeting between these two gentlemen and myself with regard to working out some method of paying the contractor so that he didn't lose money in the field in the event that there was another period where something stopped the government from using the aircraft at the contracted rate.

"I had suggested a creative approach whereby there was a minimum guarantee per day and then all heli—in which we would deliver "X" number of helicopter hours for that minimum guarantee which was based on the same rate that we subsequently used for this contract which was 144 per hour. All hours after that basic number of hours which were to cover our fixed costs in the field would have been sold at a small profit. All additional hours would have been sold to the government at our cost. So the government had an opportunity here, if they wanted to fly ten hours per day to pick up an additional three hours at a rate of about $67, $70 an hour, something like that.

"We were trying to impress the U.S.G.S. with the fact that the rate per hour was fairly irrelevant to us. What really counted to us was our cost for maintaining the equipment and the people in the field. And we needed "X" number of dollars per day for doing that, and if the government gave us those "X" number of dollars they were welcome to fly the helicopters as much as they wanted.

"Subsequent to that meeting it was suggested that this was a little bit adventuresome and time-consuming to suddenly change the government's method—

"Q. Now, that was suggested by—

"A. Mr. Thurston.

"Q. I see.

"A. He suggested that, that Cliff Eckhardt and I work out what was really required in terms of hours per day in order for us to make it using—using the same formula and method of procuring helicopter hours as the government always has in the past without revising their procurement methods."

[9] Contract, Item 1, Appeal File.

75 days. The invitation provided for a 50-day extension to a maximum of 125 days and set 875 hours as the maximum number of flying hours for which payment would be made.

Appellant states, on brief, that an average daily rate of 7 hours can be computed by dividing the minimum hours, 525, by the minimum performance time of 75 days and also by dividing the maximum hours, 875, by the maximum performance time of 125 days.[10] These computations are mathematically correct but unnecessary in view of Inter*Helo's knowledge of the rejection of its proposal for a guaranteed minimum daily number of hours. In computing the maximum cost of performance to which it might be subjected, Inter*Helo needed only to compute its fixed and operating costs for the maximum number of days of performance time and the maximum number of hours that would be paid for under the contract. Dividing that total figure by the maximum number of hours set forth would yield its hourly costs. Its bid for the hourly contract price could then have been set high enough to cover those costs and to provide for profit. The interjection into the bid calculations of a daily rate, which Inter*Helo knew had been rejected, was an exercise in futility which provided no useful information for the purpose of bid preparation.

In any event, the terms of the original invitation did not ripen into a contract. Due to a severe reduction of funds available for its projects, the Geological Survey was unable to award a contract for the number of hours of helicopter service proposed in the original invitation. Instead, the Geological Survey asked if Inter*Helo would accept a partial award at the hourly bid price for a reduced minimum of 100 hours and a maximum of 525 hours, with a reduction of the maximum performance time from 125 days to 105 days (Appeal File, Item 3). Since the proposed partial award varied the terms of the original invitation for bids, Inter*Helo was free to accept or to reject the partial award, as it saw fit, but proposing a partial award pursuant to the Federal Procurement Regulations, 41 CFR Subpart 1–2.4, did not open up the terms of the invitation for negotiation.

As indicated above, the Board finds no reasonable necessity for the calculation of an average daily rate for the helicopter services. However, from Inter*Helo's point of view, the same logic which impelled it to calculate an average daily rate of usage from the terms of the original invitation would also require it to calculate the average daily rate under the revised terms.[11] Dividing

[10] Computations such as the maximum hours in the minimum time or the minimum hours in the maximum time, while possible, do not appear to be as reasonable as appellant's interpretation. Appellant's contention that the contract performance time should be extended to the maximum number of days only if the Government orders the maximum number of hours is well-taken.

[11] On brief, appellant argues that the Government had an obligation to advise appellant that the average rate of 7 hours per day

(Continued)

the changed maximum number of hours, 525, by the changed maximum performance time of 105 days yields an average of 5 hours per day. Dividing the changed minimum number of 100 hours by the unchanged minimum performance time of 75 days yields an average of 1.33 hours per day. As it did in its decision of December 30, 1969, the Board ignores the minimum figure since testimony indicates that the 100-hour minimum was selected for budgetary reasons and it was not the intention of the Government to require that 100 hours be flown in 75 days (Tr. I 29; Tr. II 58, 59).

At the hearing on September 12, 1975, pursuant to the Court's order, the documents marked as Appellant's Exhibits A and B, which were offered at the original hearing and excluded by the Board under the parol evidence rule, were admitted into evidence. Appellant's Exhibit B, a memorandum dated November 1, 1967, from the president of Inter*Helo to the Board of Directors, sets forth his understanding of the contract in the last paragraph:

> In effect, however, the contract amount has been reduced by some $50,000. U.S.G.S. in Menlo Park tell us that this money has been lost anyhow. Worse: the money they now have in hand is only sufficient to cover the *minimum*, hence we *could* be back on the ground in as short a time as 3–4 weeks.

On the basis of the contractually prescribed 5-day work week, flying 100 hours in the 15 work days in 3 weeks would result in an average rate of 6.6 hours, while flying 100 hours in the 20 work days in 4 weeks would be at the rate of 5 hours per day. Accordingly, the Board finds that Inter*Helo's president was aware, at the time of his acceptance of the contract on the revised terms, that the minimum number of hours could be flown at the rate of 5 hours per day.

Appellant also introduced a series of internal memoranda from the president of Inter*Helo to the directors dated January 15, 1968, through January 29, 1968 (Appellant's Exhibits I through O), for the purpose of showing the parties' interpretation of the contract during performance. In these memoranda, Inter*Helo's president complains of losses incurred by reason of the Government's failure to order flying service at the rate of 7 hours per day. Appellant's Exhibit M indicates that the Government's response, when the complaints were communicated to it, was that the reduction of the overall amount of the contract reduced the average daily utilization rate from 7 hours to 5 hours. The net effect of the memoranda is to show the existence of a dispute over the rate of utilization and not to show conduct of the

(Continued)
in the original invitation was being changed, citing *United Pacific Insurance* v. *United States*, 204 Ct. Cl. 686 (1974). The argument does not address the facts. The 7 hour average was not set forth in the invitation and existed only in appellants' calculations based on the stated minimum and maximum number of hours and days. When three of the four terms, on which its calculations were based, were changed, appellant could not reasonably expect that the averages computed therefrom would remain unchanged.

parties prior to a dispute. In view of the Government's response that the contract called for an average of 5 hours per day, the subsequent increase in flying time, which brought the average above 5 hours per day, cannot be construed as a Government agreement with appellant's interpretation. The Government's conduct is consistent only with its own interpretation of a 5 hour rate per day and not with appellant's interpretation of 7 hours per day.

The insistence of Inter*Helo's president on a 7 hour per day rate does not appear to be based on his understanding at the time the contract was awarded nor can it reasonably be derived from the terms of the contract itself. We are not persuaded that the memoranda to the board of directors amount to anything more than a self-serving attempt to justify acceptance of a contract which proved to be unprofitable.[12]

Appellant offered no new evidence regarding the number of days and hours flown under the contract. On brief, appellant suggests a computation showing a total of 83 days flown during the period November 6, 1967, to February 28, 1968, and 8 days during the period March 1, 1968, to March 13, 1968, when only one aircraft was available due to a crash. The 83-day figure differs from the Board's finding of 61 days flown during the first period when both aircraft were in operation.

Examination of the operations reports for the periods (Appellant's Exhibit C) and the schedule of delivery derived therefrom, which appears as Appendix A to appellant's complaint, discloses flight operations on only 61 days during the first period. Appellant's suggested computation fails to take into account the Christmas recess, the fact that 7 compensatory days off were taken for weekends worked in November and December, and the fact that 5 days were used for moving from one project to another, for which appellant was paid separately on a mileage basis. Accordingly, the Board reaffirms its finding that 328.45 compensable hours were flown in 61 days during the first period at a rate of 5.38 hours per day or 2.69 hours per aircraft per day. During the second period, about which there is no dispute, 19.90 hours were flown in 8 days by one aircraft for a daily average of 2.47 hours. The slight deficiency of .03 hour per day below the computation of a contract rate of 2.50 hours during this period is insufficient to reduce the overall average below 2.50 hours per aircraft per day. The Board further finds that the total number of hours flown was within the range contemplated by the terms of the contract as awarded and was flown at

[12] Inter*Helo's president used the figure $600 for his fixed costs per day (App. Ex. G) while the firm's accountant testified that the fixed costs actually amounted to $703 per day (Tr. I, 82–98). The magnitude of this discrepancy suggests that a major part of appellant's problems may have resulted from submitting an improvident bid based on inadequate cost data.

an average daily rate in excess of the rate of 5 hours per day that can reasonably be calculated from the terms of the contract.

Conclusion

The record, enlarged by parol evidence as deemed proper by the Court of Claims, does not support a finding that appellant is entitled to an equitable adjustment.

The appeal is denied.

G. HERBERT PACKWOOD,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

ISLAND CREEK COAL COMPANY

5 IBMA 276

Decided *December 3, 1975*

Appeal by the United Mine Workers of America from a decision by Administrative Law Judge George H. Painter (Docket No. HOPE 74–740), dated July 3, 1975, granting in part an application for compensation filed by the United Mine Workers of America on behalf of miners at the Tioga Preparation Plant of Island Creek Coal Company pursuant to sec. 110(a) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Entitlement of Miners: Compensation: Generally

A shift for the purposes of sec. 110(a) of the Act begins at that time when payment begins and terminates when payment terminates. If a sec. 104(a) or 104(b) order of withdrawal is issued between shifts and it has not been terminated, the miners idled thereby in the following shift are entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than 4 hours of such shift.

APPEARANCES: Steven B. Jacobson, Esq., for appellant, United Mine Workers of America.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG
INTERIOR BOARD OF CONTRACT APPEALS

Factual and Procedural Background

On December 16, 1974, a Mining Enforcement and Safety Administration (MESA) inspector issued to Island Creek Coal Company (Island Creek) Notice of Violation No. 1 JED for an alleged violation of the Federal Coal Mine Health and Safety Act of 1969 (Act)[1] in its Tioga Preparation Plant, Tioga, Nicholas County, West Virginia. Subsequently, at 7:15 a.m. on March 5, 1975, pursuant to sec. 104(b) of the Act, the same inspector issued Order of Withdrawal No. 1 JDD on the grounds that "little or no effort has been made to abate this notice." Order No. 1 FFN, March 6, 1975, issued at 1 p.m., modified the above order and al-

[1] 30 U.S.C. §§ 801–960 (1970).

lowed miners to return to the area ordered withdrawn.

On April 9, 1975, the United Mine Workers of America (UMWA) filed an application for compensation with the Office of Hearings and Appeals. At a prehearing conference the parties stipulated to the following facts. First, at 7:15 a.m. on March 5, 1975, Federal Inspector John E. Dotson issued Withdrawal Order No. 1 JDD, March 5, 1975. The order prohibited any person from entering or working in the bottom of the raw coal and clean coal silos at the Tioga Preparation Plant. Second, the night shift at the Tioga facilities officially ended at 7 a.m. except for one mechanic who worked until 7:30 a.m. and was the only night shift employee who worked in the preparation plant area. Third, the day shift at the Tioga facility officially began at 7:30 a.m. However, prior to this time the employees generally arrived at the work site and changed into work clothes. Fourth, as a result of the inspector's order, the coal preparation facility was closed after 4 hours of work on the day shift. Although the entire preparation plant itself was not covered by the order, no more coal could be processed as no raw coal could be removed from the silos. Fifth, the preparation plant employees on the March 5, 1975, day shift worked only 4 hours and those on the evening shift of that date did not work at all.

Administrative Law Judge Painter (Judge) held that a literal reading of the phrase "during the shift" in sec. 110(a) requires a finding that the instant order was not issued during but prior to the shift which renders the day shift the "next working shift" and mandates the operator to pay the day shift employees for up to 4 hours of idle time. He held that this requirement is not negated by the fact that compensation for work was paid for the initial 4 hours of the day shift. He further held that the operator is not required to pay compensation to any mine employees for idle time after the end of the March 5 day shift. UMWA filed a timely notice of appeal with this Board on July 24, 1975. A timely brief was filed by UMWA. The Mining Enforcement and Safety Administration did not participate in the hearing nor on appeal. The operator, Island Creek, has not participated in this appeal.

Contentions of UMWA on Appeal

The UMWA's basic contention is that the Judge erred in finding that the order in question was not issued "during" the Mar. 5, 1975, day shift. As a consequence of this finding UMWA further contends it is error to deny the day shift workers pay for the balance of that shift and the night shift workers 4 hours pay as the "next working shift." In support of its appeal UMWA has three arguments as follows: (1) that in effect the order was issued

during the day shift; (2) where an order is not in fact issued during any shift it must be considered as having been issued during the next following shift; and (3) that sec. 110(a) must be interpreted as providing compensation for the first two shifts idled by the closure order notwithstanding the time when the order was actually issued.

Issues Presented

A. At what point in time does a shift begin.

B. Whether the Judge erred in finding that the order was not issued "during" any shift.

C. Whether the order should be considered to have been issued "during" the day shift in light of the purpose behind section 110(a).

Discussion

A.

Sec. 110(a) of the Act is relied upon by UMWA in its claim for compensation for the idled miners. The appropriate part of that section provides as follows:

> If a coal mine or area of a coal mine is closed by an order isued under sec. 104 of this title, all miners working during the shift when such order was issued who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than 4 hours of such shift. * * *

Conference Report No. 91-761 presented to the House of Representatives in the first session of the 91st Congress contains sec. 110(a) as it exists in the law today.[2] The Statement of the Managers on the Part of the House explains the above and indicates that the Senate bill provided for compensation to miners only if a withdrawal order was issued for repeated failures to comply with a health or safety standard. The Statement further indicates:

> * * * The corresponding provision of the House amendment provided that where a withdrawal order has been issued all miners *working during the shift when the order was issued* who are idled by the order will be entitled to full compensation at their regular rates of pay for the period they are idled, but not for more than the balance of the shift: * * (Italics added.)[3]

This limited House amendment was approved by the Committee and supplemented the Senate bill.

UMWA argues in its brief, while conceding that payment of the miners for the day shift did not begin until 7:30 a.m., that "shift" is an ambiguous term subject to two definitions. The UMWA favored definition includes "at least 15 minutes prior to 7:30" as part of the day shift.

[1] We cannot agree that "shift" is an ambiguous term. The term is used very extensively in the coal in-

[2] Legislative History, Federal Coal Mine Health and Safety Act, Mar. 1970, p. 978.

[3] *Id.* at page 1035.

dustry. The dictionary defines the term as "a scheduled period of work or duty." [4] Such is the ordinary meaning of "shift" when used in this context. In the absence of Congressional intent to the contrary, it is incumbent upon the Board to interpret the language in the Act according to its ordinary meaning. The ordinary meaning of "shift" as used throughout the coal industry and in the Act is that period of time during which the miners are actually being paid. The construction suggested by UMWA not only circumvents this ordinary meaning, but also opens it to arbitrary determinations regarding the point at which a shift actually begins. Therefore, the order in this case, issued at 7:15 a.m., was issued 15 minutes prior to the day shift and 15 minutes after the night shift and not "during" any shift.

B.

We cannot adopt the proposition advanced by UMWA that Congress intended that "all closure orders are to be considered as having been issued during one shift or another" nor that "Where a closure order is not issued during any shift it must be considered as having been issued during the next following shift, for purposes of sec. 110(a)." The position of UMWA presupposes that Congress was either intent on punishing the operator over and above closure, loss of production and imposition of civil monetary penalties or was legislating charitable contributions from operators to its miner employees. In either event, there would be no reason not to compensate all miners for the entire time they were idled by the closure order. However, we do not so glean this to be the intent of the Congress. Rather we feel the intent to be to attempt to compensate only those miners whose work activity was most abruptly curtailed by the closure order. We will interpret the provision in this light and accord ordinary meaning to the ordinary terms used in the legislation.

C.

Furthermore, we are inclined to believe that the provisions of sec. 110(a) of the Act were designed with knowledge of and perhaps as an extension of the industry practice for payment of reporting pay. Congress recognized a need for payment to miners as partial recompense for idle time occasioned by the abrupt issuance of withdrawal orders. Being aware that the issuance of a withdrawal order in most instances will be without fault of the miners, Congress incorporated this provision for partial compensation. Obviously, the Congress felt those working the shift during which the order is issued are entitled to be compensated as though they had worked the full 8 hours of the shift since their work would be abruptly halted through no fault of their own. Furthermore, Con-

[4] *Webster's Seventh New Collegiate Dictionary*, G. & C. Merriam Co. c. 1969, p. 800.

gress was obviously concerned that miners on the subsequent shift may not be timely advised of the issuance of the withdrawal order and may report for work. Rather than leave the determination of timely notice to chance or the uncertainties of communications and being aware that withdrawal orders may be issued at any time during a shift, Congress declared that all miners on the next working shift would be entitled to full compensation for up to 4 hours and thereby effectively eliminated any dispute over timeliness of notification to the miners. We view sec. 110(a) as a practical solution to what could be a never-ending dispute and therefore should be interpreted in this light rather than as the imposition of a penal sanction on the operator.

Based upon the evidence of the instant case we find, as did the Judge, that the order in question was not issued "during the shift" and that the miners on the "day shift" commencing at 7:30 a.m. are logically on the "next working shift" entitled to full compensation by the operator at their regular rates of pay for the period they were idled, but for not more than 4 hours of such shift.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned case IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

UNITED STEEL CORPORATION

5 IBMA 293

Decided *December 12, 1975*

Appeal by the Mining Enforcement and Safety Administration from a decision and order by Administrative Law Judge George H. Painter (Docket No. BARB 74–1412–P), dated May 27, 1975, vacating a notice of violation in a civil penalty proceeding brought pursuant to section 109 of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed in result.

Federal Coal Mine Health and Safety Act of 1969: Mandatory Safety Standards: Methane Tests

Sec. 303(h)(1) of the Act and its counterpart, 30 CFR 75.307, pertain only to methane tests at working places where electric equipment is operated or about to be operated. It is improper to cite an operator for violation of this standard when an operator fails to make methane tests at a working place where electrically operated equipment is neither present nor about to be operated.

APPEARANCES: Fredric K. Rosenberg, Trial Attorney, for appellant, Mining Enforcement and Safety Ad-

ministration; Billy M. Tennant, Esq., for appellee, United States Steel Corporation.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

In a threshold circumstance, the Board is asked to construe 30 CFR 75.307, the subject of an appeal by the Mining Enforcement and Safety Administration (MESA) from a decision by an Administrative Law Judge (Judge) in a proceeding brought pursuant to sec. 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969 (the Act). 30 U.S.C. § 819(a) (1970). The language of 30 CFR 75.307 is a restatement of sec. 303(h)(1) of the Act, and the part thereof in dispute reads as follows:

> At the start of each shift, tests for methane shall be made at each *working place* immediately before electrically operated equipment is energized. * * * (Italics added.)

30 U.S.C. § 863(h)(1) (1970).

The Judge concluded that this provision requires methane tests to be made only in the working *faces* where electrical equipment is about to be operated, or is operating (Dec. 2). For reasons cited hereinafter, we affirm the result reached by the Judge, but would rely on the term, "working places" as the point of reference, rather than the term, "working faces," as used by the Judge.

PROCEDURAL AND FACTUAL BACKGROUND

On November 13, 1973, Clarence Parsons, a duly authorized inspector for the Mining Enforcement and Safety Administration (MESA), issued a sec. 104(b) notice of violation charging United States Steel Corporation (U.S. Steel) with a violation of 30 CFR 75.307 at its Winifrede Mine in Lynch, Kentucky. The notice of violation—Notice 3 CP, 11–13–73—reads as follows:

> Suitable examinations for methane at the start of each shift of each working place were not being made before electrically operated equipment was energized in D–26 section of the mine in that the mine foreman stated examinations were made only where equipment had been working or was to operate.

On May 15, 1974, MESA filed a Petition for Assessment of Civil Penalty and U.S. Steel filed a timely answer denying that the subject violation occurred and requesting a hearing on this matter. On Apr. 8, 1975, a hearing was held before the Judge and in a decision and order issued on May 27, 1975, the Judge vacated the notice of violation in ruling that U.S. Steel had not violated 30 CFR 75.307.

On June 16, 1975, a Notice of Appeal was timely filed with the Board by MESA. On July 3, 1975, MESA filed a brief in support of its appeal. U.S. Steel responded by filing an appellee's brief on July 17, 1975.

The following facts are undisputed: five working places were lo-

cated within Section D–26 of the Winifrede Mine when the notice of violation was issued (Tr. 5); methane tests had only been made in the No. 3 working place; and electrically operated equipment was being operated only in that working place (Joint Exhibit No. 1).

Contentions of the Parties

MESA contends in substance that 30 CFR 75.307 requires that methane tests be made at each working place irrespective of whether electrical equipment is operating or is about to be operated therein.

U.S. Steel contends that 30 CFR 75.307 can best be analyzed in light of other ventilation standards, particularly secs. 75.303, 75.304, and 75.308. It maintains that such an analysis shows that the requirement for testing methane as prescribed by sec. 75.307 only "pertains to the working places where electrically operated equipment is located and/or about to be operated." (Page three of appellee's brief.)

Issues Presented on Appeal

Whether the Judge erred in concluding 1) that 30 CFR 75.307 requires only that methane examinations be made in working *faces* where electrical equipment is about to be operated or is operating, and 2) that U.S. Steel did not violate 30 CFR 75.307.

Discussion

Sec. 318(g)(2) of the Act defines a "working place" as the "area of a coal mine inby the last open crosscut." 30 U.S.C. § 878(g)(2) (1970). Sec. 318(g)(1) of the Act defines a "working face" as "any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle." 30 U.S.C. § 878(g)(1) (1970). The Board, as did the Judge, determines that a working place may contain one or more working faces. We construe 30 CFR 75.307 to impose upon an operator the requirement to make methane tests only at a working place immediately before electrically operated equipment is energized at that working place.

Consonant with this reasoning, the Board concludes that Congress, if it had intended otherwise, would have expressed in the subject section of the Act that methane tests be made at each working place *irrespective of whether electrically operated equipment is being energized or is about to be energized in that working place.* The fact that Congress did *not* do so, supports our construction of that sec.

Furthermore, we agree with U.S. Steel that proper analysis of 30 CFR 75.307 requires analysis of 30 CFR 75.303, 304, and 308 which regulations provide the necessary additional safeguards with respect to general testing for methane in those areas where no electric equipment is located or about to be operated.

Based upon the foregoing, we conclude that U.S. Steel did not violate 30 CFR 75.307 and affirm the

Judge's vacation of the subject notice of violation.

ORDER

WHEREFORE, pursuant to authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision in the above-captioned case IS AFFIRMED.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

KANAWHA COAL COMPANY

5 IBMA 299

Decided *December 12, 1975*

Appeal by Kanawha Coal Company from a decision by Administrative Law Judge Joseph B. Kennedy in Docket No. M 75–115, dated Sept. 24, 1975, in which the Judge granted a motion to dismiss filed by the United Mine Workers of America and a motion for summary decision filed by the Mining Enforcement and Safety Administration and dismissed Kanawha's Petition for Modification of the application of 30 CFR 71.300–305 (Noise Standard, Surface Work Area of Underground Mines) to its Madison Preparation Plant.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Modification of Application of Mandatory Health Standards: Jurisdiction

Sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969 does not authorize modification of the application of mandatory *health* standards. (Sec. 103(c) and 43 CFR 4.500).

APPEARANCES: Edward N. Hall, Esq., and Harold S. Albertson, Esq., for appellant, Kanawha Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor, and John D. Austin, Jr., Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration; and Steven B. Jacobson, Esq., for appellee, United of Mine Workers of America.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

This appeal arises from the filing by Kanawha Coal Company (Kanawha) on Apr. 29, 1975, of a Petition for Modification of the application of 30 CFR 71.300–305. These regulations, appearing in Subpart D of Part 71 of Title 30 of the Code of Federal Regulations, comprise the noise standards of the mandatory health standards for surface work areas of underground coal mines and surface coal mines. On May 1, 1975, the United Mine Workers of America (UMWA) filed a motion to dismiss the Petition on the grounds that the Secretary of the Interior has no authority to modify the application of manda-

tory health standards pursuant to sec. 301(c) of the Federal Coal Mine Health and Safety Act of 1969 or any other sec. of the Act or Regulations. On May 2, 1975, the Mining Enforcement and Safety Administration (MESA) filed a motion for summary decision on the same grounds set forth by UMWA and, in addition, on the ground that the petition failed to state a claim upon which relief could be granted.

Based upon his finding that the Act does not provide authority for modification or waiver of mandatory health standards, the Judge granted both MESA's and UMWA's motions and dismissed Kanawha's Petition. It is this dismissal which Kanawha is appealing. On appeal, Kanawha challenges the Judge's finding that sec. 301(c) of the Act does not provide jurisdiction for modification of mandatory health standards and contends that the statutory omission of a counterpart to sec. 301(c) for modification of health standards is an unconstitutional denial of due process and the right to equal protection.

The statutory and regulatory provisions upon which Kanawha alleges our jurisdiction is based are as follows:

Sec. 301(c), which provides:

> Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a mine. * * *

and 43 CFR 4.500(a), which provides:

> The Board of Mine Operations Appeals * * *, is authorized to exercise * * * the authority of the Secretary under the * * * Act * * * pertaining to:
>
> * * * * * * *
>
> (4) Petitions for modification of mandatory safety standards;
>
> * * * * * * *

It is clear beyond doubt that sec. 301(c) of the Act, upon which Kanawha relies, does not authorize or contemplate the modification of the application of mandatory *health* standards. First, by its terms, it relates only to safety standards; second, and most importantly, it appears under Title III of the Act which pertains only to safety standards. Title II of the Act relates to health standards and does not contain any comparable provision. Contrary to the contentions of Kanawha, both the above provision of the Act and regulations are not ambiguous, but are clear and unequivocal. Congress did not intend sec. 301(c) to apply to health standards. Accordingly, we conclude that the provisions of sec. 301(c) of the Act confer no jurisdiction in the Secretary or this Board to consider a modification of the application of any mandatory health standard. Furthermore, since 43 CFR 4.500(a)(4) is premised upon sec. 301(c), it delegates no more authority than that which the Secretary possesses under that sec. of the Act.

The Board has previously held that we have no authority to pass upon the constitutionality of the Act[1] and, for that reason, we will

[1] *Buffalo Mining Company*, 2 IBMA 226, 80 I.D. 630, 1973–1974 OSHD par. 16,618 (1973); *Zeigler Coal Company (On Reconsideration)*, 4 IBMA 139, 82 I.D. 221, 1974–

not entertain the due process and equal protection arguments advanced by Kanawha.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior, IT IS HEREBY ORDERED that the Judge's decision and order in the above-captioned case IS AFFIRMED.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

REPUBLIC STEEL CORPORATION

5 IBMA 306

Decided *December 16, 1975*

Appeal by the Mining Enforcement and Safety Administration from a decision in Docket No. MORG 76-21 by Administrative Law Judge George A. Koutras vacating a withdrawal order previously issued under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969.

Reversed.

Federal Coal Mine Health and Safety Act of 1969: Secretarial Orders: Generally

An order signed by the Secretary which establishes enforcement policy is binding throughout the Department, and its validity is neither procedurally nor substantively subject to challenge at the administrative level.

APPEARANCES: Thomas A. Mascolino, Assistant Solicitor, Robert A. Cohen and Michael V. Durkin, Trial Attorneys, for appellant, Mining Enforcement and Safety Administration; W. Scott Ferguson, Esq., for appellee, Republic Steel Corporation.

MEMORANDUM OPINION AND ORDER INTERIOR BOARD OF MINE OPERATIONS APPEALS

The Mining Enforcement and Safety Administration (MESA) appeals from a summary decision by Administrative Law Judge George A. Koutras in Docket No. MORG 76-21, vacating a withdrawal order, citing an alleged violation of 30 CFR 71.101, which had been issued on Aug. 13, 1975 by a duly authorized MESA inspector under sec. 104(b) of the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 814(b) (1970). Judge Koutras vacated the subject withdrawal order on the strength of our decision in *Affinity Mining Company*, 2 IBMA 57, 80 I.D. 229, 1971-1973 OSHD par. 15,546 (1973), holding that the sole person named as the responsible party in such order, appellee Republic Steel Corporation (Republic), was not the "operator" within the meaning of secs.

1975 OSHD par. 19,638 (1975); and *Billy K. Hatfield, et al.* v. *Southern Ohio Coal Company*, 4 IBMA 259, 82 I.D. 289, 1974-1975 OSHD par. 19,758 (1975).

3(d) and 104(b) of the Act, 30 U.S.C. §§ 802(d), 814(b) (1970). MESA contends in its late-filed brief on appeal that the *Affinity* decision is no longer controlling in cases, such as the one at bar, involving coal mine construction contractors. It submits that the governing authority is a declaratory judgment rendered from the bench by the United States District Court for the District of Columbia in *Assn. of Bituminous Contractors, Inc.* v. *Morton*, Civil No. 1058–74 (D.C. D.C., May 23, 1975),[1] *appeal pending*, D.C. Cir. Nos. 75–1931 and 75–1932,[2] allegedly binding on the Department by Secretarial Order 2977 issued as a policy directive on August 21, 1975, and effective retroactive to May 24, 1975.[3]

By way of response, Republic contends that the subject Secretarial Order is not binding because it is limited in applicability by its terms to MESA inspectors. Alternatively, Republic urges affirmance based on the *Affinity* decision arguing: (1) that, even if it be assumed *arguendo* that the Secretarial Order was intended as a policy directive binding on the Administrative Law Judges and the Board, such order is invalid for the reason that published case precedents of the Secretary established by the Board, which set binding "policy," within the meaning of 5 U.S.C. § 551(4) (1970), can be overruled by him *personally*[4] only if he promulgates a regulation in accordance with applicable rulemaking procedures including at least publication, 30 U.S.C. § 957 (1970), 5 U.S.C. §§ 553, 559 (1970); (2) that, given the same assumption, the Secretarial order is invalid under the doctrine of *Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), and its progeny; and (3) that the declaratory judgment and order of the district court in *Assn. of Bituminous Contractors, Inc.* v. *Morton*, *supra*, is neither binding nor correct as a matter of law.

[1] The transcript of the court's opinion and the declaratory order based thereon appear in the record as an attachment to a motion by Republic for expedited proceeding filed below on Aug. 25, 1975.

[2] No. 75–1931 is the docket number assigned by the court to the appeal of the United Mine Workers of America (UMWA) which was filed on June 23, 1975. No. 75–1932 is the docket number assigned to the appeal filed by the Secretary.

[3] Secretarial Order 2977 was issued by Acting Secretary Kent Frizzell and reads as follows:

"Subject: Issuance of citations to operators pursuant to the Federal Coal Mine Health and Safety Act of 1969.

"Sec. 1 *Purpose.* (a) The purpose of this order is to direct Mining Enforcement and Safety Administration to continue to inspect construction work conducted on coal mine property, and to issue appropriate citations for violations of the Federal Coal Mine Health and Safety Act of 1969 and/or for hazardous conditions or practices committed and/or created by contractors on such property on and after May 24, 1975 to the operator of the coal mine on whose behalf the contractor is performing work.

"(b) This order is issued to comply with the declaratory judgment order in *Association of Bituminous Contractors, Inc.* v. *Rogers C. B. Morton, Secretary of the Interior*, Civil Action No. 1058–74, U.S. District Court for the District of Columbia, and to carry out the mandate of Congress announced in the Federal Coal Mine Health and Safety Act of 1969 to enforce the provisions of the Act in all coal mines subject to the Act.

"Sec. 2 *Effective Date.* This order shall be effective as of May 24, 1975. This order will remain in effect until rescinded by subsequent order of the Secretary."

[4] Of course, in an appropriate case, the Board could overrule one of its own decisions without rulemaking. *See* 30 U.S.C. § 956 (1970).

We agree with MESA that Secretarial Order 2977 is a policy directive intended to bind the entire Department, including the Administrative Law Judges and the Board. Republic's contention that such order was intended to bind only MESA is without merit. Nothing but chaos and confusion could result from upholding that view. We believe it to be a reasonable certainty that the Acting Secretary, by his Order, did not intend to establish an enforcement policy with respect to liability of coal mine construction contractors, only to have such policy nullified by various decisions of his adjudicative arm.

We intimate no views with respect to Republic's attack on the legality of the Secretarial Order inasmuch as review of actions taken by him personally, as they apply to the subject proceeding, may only be had initially in the appropriate federal circuit court of appeals under section 106 of the Act. 30 U.S.C. § 816 (1970).[5] Moreover, we need not deal with Republic's challenge to the declaratory judgment and order in *Assn. of Bituminous Contractors, Inc.* v. *Morton, supra*, because, even if sound, such challenge is irrelevant to the meaning of the Secretarial Order which is all with which we can be directly concerned in this case.

[5] We would take the same attitude toward any challenge to the authority for or constitutionality of the retroactivity feature of the Secretary's substantive change of policy in his order. 5 U.S.C. § 551(4) (1970), Const. Amend. 5.

It is, therefore, the judgment of the Board that, so long as the Secretary's Order is in effect, the policy of the Department is that the owner or lessee of a coal mine is the sole party to be held absolutely liable for violations of the mandatory standards committed by a coal mine construction contractor regardless of the circumstances. Insofar as the Department is concerned, including the Administrative Law Judges and the Board, it does not matter any longer in such cases that the owner's or lessee's employees neither caused nor were exposed to a violation of the Act, and it is no longer of any moment that the owner or lessee was not realistically in a position to comply with the mandatory standards or to command the abatement of hazards resulting from violations thereof. In accordance with the policy of the Department, as established by the Acting Secretary, we are compelled to overturn the decision below.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1 (4)), IT IS HEREBY ORDERED that MESA's motion to accept its brief for late filing IS GRANTED and the decision in the above-captioned docket IS REVERSED.

DAVID DOANE,
Chief Administrative Judge.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

CHIEF ADMINISTRATIVE JUDGE DOANE, CONCURRING:

Although I join in the opinion and order of the Board, I deem it appropriate to make an additional statement of my views in order to clarify certain aspects of the record and to deal more particularly with Judge Koutras' evident assumption that the declaratory judgment and order of the district court in *Association of Bituminous Contractors, Inc.* v. *Morton*[1] is not binding on the Secretary, an assumption apparently not shared by MESA. For the reasons set forth hereinafter, I am of the view that Judge Koutras correctly assumed that the court's decision, *standing by itself*, was not binding, because such decision constituted an invasion of the Secretary's primary jurisdiction.

Procedural and Factual Background

The declaratory judgment and order in *Assn. of Bituminous Contractors, Inc.* v. *Morton, supra*, was handed down on May 23, 1975.

On June 3, 1975, John W. Crawford, MESA Assistant Administrator for Coal Mine Health and Safety, issued an unpublished, internal policy memorandum directing that the ruling of the court be applied by MESA. This memorandum was addressed to all District Managers—Coal Mine Health and Safety; and Chief, Division of Health, and it concludes with respect to coal mine construction contractors as follows:

> Effective upon receipt of this memorandum Coal Mine Health and Safety Enforcement personnel will cite coal mine operators for all violations observed when inspecting contractors performing work on coal mine property.

By subsequent memorandum, dated June 17, 1975 Mr. Crawford directed reissuance, to owners, of citations of coal mine construction contractors, dated prior to June 3, 1975, and still in processing under the civil penalty provisions of the Act. 30 U.S.C. § 819 (1970).[2]

The memoranda of Mr. Crawford to the contrary notwithstanding, the Secretary filed an appeal of the subject district court decision in the United States Court of Appeals for the District of Columbia Circuit on July 21, 1975. That appeal is currently pending.

On August 4, 1975, MESA Inspector Richard K. Pill issued Notice of Violation 3 RKP under sec. 104(b) of the Act which, in accordance with the Crawford memoranda, cited Republic for the following alleged violation of 30 CFR 71.101 at its Kitt Mine No. 1 by a coal mine construction contractor:

> The Roberts and Schaefer Construction Company doing construction work on operator property has not collected respirable dust samples on their employee [*sic*] as required.

[1] Civil No. 1058–74 (D.C. D.C. May 23, 1975), *appeal pending*, D.C. Cir. Nos. 75–1931 and 75–1932.

[2] MESA has not argued that the subject withdrawal order can be sustained on the basis of Mr. Crawford's memoranda which appear in the record as attachments to Republic's motion for expedited proceeding filed below on Aug. 25, 1975.

The subject notice required total abatement by Aug. 11, 1975.

On Aug. 13, 1975, Inspector Pill returned to the subject mine and upon finding that "little or no effort was being made to abate the violation" cited in the August 4 notice, he issued Order of Withdrawal 1 RKP which required the following action:

> You are hereby ORDERED to cause immediately all persons, except those referred to in subsection (d) of section 104 of the Act to be withdrawn from, and to be prohibited from entering, the area of the mine described below until an authorized representative of the Secretary of the Interior determines that the condition of practice no longer exists and has been totally abated:
>
> Area of Mine
>
> This order prohibits the operator to allow the Roberts and Schaefer Construction Company to preform [*sic*] the work that the construction company is required to do.

The subject withdrawal order was terminated by Inspector Pill the same day by Order 2 RKP.

On August 21, 1975, Acting Secretary Frizzell issued Order 2977 which is quoted in full at n. 3, of the Board's opinion, *supra* at 308.

Subsequently, on Aug. 25, 1975, Republic instituted the present proceeding by filing an application for review of Order 1 RKP pursuant to sec. 105(a)(1) of the Act. 30 U.S.C. § 815(a)(1) (1970). On that same date, Republic also moved for an expedited proceeding under 43 CFR 4.514 and for summary decision under 43 CFR 4.590.

MESA filed a statement in opposition to Republic's motion for summary decision and cross moved for the same on Sept. 5, 1975. The United Mine Workers of America (UMWA) neither answered the application for review, 43 CFR 4.507 (c), nor responded to the cross motions, 43 CFR 4.510.

The cross motions revealed agreement on the essential facts, namely, that Roberts and Schaefer Construction Company is a coal mine construction contractor which, at all pertinent times, was engaged in the construction of a coal preparation plant at the subject mine and had exclusive, independent responsibility and control over the construction of such plant and the employees in question. An uncontroverted affidavit, attached to Republic's motion for summary decision and given by E. R. Elswick, Mine Superintendent for the subject mine, establishes that at all relevant times Republic has taken respirable dust samples for its employees in the active workings of such mine, but has not done so with respect to the employees of its contractor.

By summary decision dated Sept. 11, 1975, Judge Koutras granted Republic's motion for summary decision and denied MESA's cross motion therefor *sub silentio*. Based on these rulings, he vacated Order 1 RKP.

On Sept. 17, 1975, MESA filed a timely notice of appeal, 43 CFR 4.600, and moved in the alternative for summary disposition and an expedited briefing schedule. Republic

filed a statement in opposition on Sept. 23, 1975. By order issued September 25, 1975, the Board denied MESA's motion.

Thereafter, on Oct. 10, 1975, MESA late filed its brief on appeal together with a covering motion requesting that the Board accept it for late filing.

Republic timely filed its reply brief on Nov. 3, 1975. The UMWA did not seek to participate on appeal either as an intervenor or as an *amicus curiae*.

Discussion

Judge Koutras was of the opinion that the declaratory judgment and order of the district court in *Assn. of Bituminous Contractors, Inc.* v. *Morton, supra*, did not, *by itself*, impair the authority of Secretarial case precedents established by the Board.

The judgment of the district court turned substantively on a construction of the somewhat ambiguous definition of the word "operator" embodied in sec. 3(d) of the Act which reads as follows:

> "operator" means any owner, lessee, *or other person* who operates, controls, or supervises a *coal mine;* * * *. [Italics added.] [3]

[3] The court found determinative significance in the use of the word "or" in the above-quoted definition. It thought that this usage warranted a narrower construction of the term "operator," excluding coal mine construction contractors, than would be the case if the legislators had chosen the conjunctive word "and." I observe in passing that the Senate-House Conference Report contains the following: "The definition of an 'operator' is designed to be as broad as possible to include any individual, organization or agency, whether owner, lessee or otherwise, that operates, controls, or supervises a coal mine, either directly or indirectly." * * * House Comm. on Ed. and Labor, *Legislative History Federal Coal Mine Health and Safety Act* (hereinafter *Leg. Hist.*), Comm. Print, 91st Congress, 2d Session, pp. 1,114–1,115.

The italicized term "coal mine" is, like the word "operator," a term of art, and in sec. 3(h) of the Act, 30 U.S.C. § 802(h) (1970), is defined as:

> * * * an area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite, or anthracite from its natural deposits in the earth by any means or method, and the work of preparing the coal so extracted, and includes custom preparation facilities; * * *.[4]

To date, there have been no regulations promulgated by the Secretary under 5 U.S.C. § 553 (1970) to elucidate the meaning of the term "operator," as used in various secs. of the Act, pursuant to the general grant of rulemaking authority in sec. 508 of the Act. 30 U.S.C. § 957 (1970). Until the issuance of the subject Secretarial Order, the Secretary had chosen to interpret this term on a case-by-case basis in the exercise of his primary jurisdiction by and through the Board. 43 CFR 4.1, 4.1(4), and 4.500.

The occasion for interpreting and applying sec. 3(d) and the term "operator" has arisen only intermittently since the Act became effective in 1970.

[4] *See Leg. Hist., supra*, p. 1,115.

It first arose in the context of an application for review of an allegedly discriminatory discharge under sec. 110(b)(1)(A) of the Act. 30 U.S.C. § 820(b)(1)(A) (1970). In *Wilson* v. *Laurel Shaft Construction Co., Inc.*, 1 IBMA 217, 79 I.D. 701, 1971–1973 OSHD par. 15,387 (1972), *reconsideration denied*, 2 IBMA 1 (1973), the Board sustained a decision by an Administrative Law Judge directing reinstatement of two individuals who had been discharged by reason of their reporting to a federal coal mine inspector certain alleged safety hazards. In so deciding, the Board held that Laurel Shaft, an independent coal mine construction contractor who had been engaged in construction of a mine ventilation shaft, was an "operator" and a "person," within the meaning of sec. 3(d), subject to the restrictions of sec. 110(b)(1)(A) of the Act. Laurel Shaft could have appealed the Board's decision to an appropriate court of appeals in order to raise the question of the proper construction of the terms construed by the Board, but apparently elected not to do so. 30 U.S.C. § 816 (1970).

The second case presenting the question of the liability of a contractor under the Act was *Affinity Mining Company*, 2 IBMA 57, 80 I.D. 229, 1971–1973 OSHD par. 15,546 (1973). There, in the context of a proceeding to assess civil penalties against Affinity under sec. 109 of the Act, 30 U.S.C. § 819 (1970), the Board upheld an order of dismissal on the ground that Affinity, the owner of the subject mine, was not liable for the instant violations by Cowin Construction Company, a coal mine construction contractor. The Board so held because: (1) Affinity's employees did not commit the alleged violations; (2) none of Affinity's employees was exposed to the hazards created by such violations; and (3) only Cowin was realistically in a position to abate, inasmuch as it had sole control over on-site operations. In passing, 2 IBMA at 61, the Board indicated that there might be circumstances where an owner might be additionally liable for an assessment of civil penalty for violations of the mandatory standards committed by a contractor, but left that determination open for future cases. *See, e.g.*, *Peggs Run Coal Company*, 5 IBMA 175, 82 I.D. 516, 1975–1976 OSHD par. 20,033 (1975).[5]

Parenthetically, I note that MESA's organizational predecessor, the Bureau of Mines (Bureau),[6] argued in substance that there never could be joint or several liability and that only the true owner could be the "operator," within the mean-

[5] In *Peggs Run Coal Company, supra*, the Board held the "owner" of a "coal mine" liable where it had materially abetted a violation by allowing a truck of an independent haulage contractor without the required backup alarm to enter the premises. There, the "owner" had exposed its employees to a hazard which it was realistically in a position to prevent or abate. In so holding, the Board made obvious a principle which was implicit in *Affinity Mining Company, supra*, namely, that the common law distinction between independent and other kinds of contractors is not determinative in fixing responsibility and liability under the Act.

[6] *See* 38 FR 18695 (1973).

ing of secs. 3(d) and 104(b) of the Act. The Bureau and later MESA have maintained that the position ultimately adopted by the Board in *Affinity* created severe and unjustifiable administrative difficulties for inspectors who must determine initially who is responsible for a given violation. The Board has never found this consideration persuasive because some imaginative amendments to the reporting regulations concerning operator legal identity reports would go far in easing any such difficulties. 30 U.S.C. § 817(d) (1970); 30 CFR 82.1 *et seq.* In addition, the Board has never thought that considerations of administrative ease and convenience in this context, even if relevant, could outweigh the disruptive and unfair effects if the construction of the Act urged by the Bureau and later MESA were adopted. *See Anning-Johnson & Workinger Electric, Inc.* v. *OSHRC*, 516 F. 2d 1081, 1974–1975 OSHD par. 19,684 (7th Cir. May 27, 1975).[7]

The decision in *Assn. of Bituminous Contractors, Inc.* v. *Morton*, *supra*, in a suit for declaratory and injunctive relief, was handed down roughly 2 years after *Affinity* was decided. Although the court there denied injunctive relief, it did conclude that the Secretary had erred in treating any coal mine construction companies as operators in various unidentified regulatory proceedings involving the assessment of civil penalties. Inasmuch as the proceedings to which the court refers must have taken place in the Assessment Office of MESA initially and later before an Administrative Law Judge, it is plain that the district judge was holding that the construction of the term "operator" which emerged from a comparison of *Laurel Shaft* and *Affinity* was erroneous. But what the court ignored or was unaware of is that none of the cases to which it referred has ever reached the Board. It follows necessarily that there has been no exhaustion of administrative remedies in any of those cases. In addition, since all the proceedings to

[7] First and foremost, in situations where the owner's employees neither caused nor were exposed to the violative conditions, and where only the contractor was realistically in a position to prevent or abate, the latter's employees who were exposed would be unable to call upon the Secretary to take efficient enforcement action against the person directly responsible. The Board has been unable to perceive any justification for the detriment to these endangered employees which would flow from insulating all contractors from responsibility and liability by adopting MESA's extremely narrow interpretation of the coverage of our remedial Act which should be construed liberally.

Second, in the case of nonserious violations, inability of the owner to abate would apparently require issuance of a sec. 104(b) order of withdrawal, a remarkably damaging and disproportionate result. 30 U.S.C. § 814(b) (1970).

Third, although some owners of coal mines are economically strong enough to bargain for insertion of indemnification clauses in future contracts or existing contracts, others are not and will consequently become the insurer of someone who is free to violate the Act, apparently with impunity. Moreover, even if the contractor is amenable to such a clause, it may be precluded by existing labor agreements. Where contractors and/or unions are not agreeable to renegotiation of an existing contract, there will undoubtedly be suits for damages and equitable relief proliferating in both federal and state courts.

And it is fair to say that the short and long-term costs of the disruption will ultimately be borne by the consuming public.

which the court adverts in its opinion involve cases brought under section 109 of the Act, the court volunteered an avenue of review at the operator's initiative which the Congress deliberately precluded. *Compare* 30 U.S.C. § 819(a)(4) *with* 30 U.S.C. § 956 (1970). *Lucas Coal Company* v. *Interior Board of Mine Operations Appeals*, 522 F.2d 581 (3d Cir. 1975). Moreover, to the extent that the violations in those cases were cited in section 104 notices and abated, or were cited in sec. 104(b) or (c) withdrawal orders, the court apparently ignored what should be the fatal omission to file a timely application for review by which any contractor could have litigated at its own initiative and sought an adequate remedy. 30 U.S.C. § 815(a) (1970). *Lucas Coal Company* v. *Interior Board of Mine Operations Appeals*, *supra*.[8] Finally, we observe parenthetically that, to our knowledge, no contractor has petitioned the Secretary to engage in interpretative rulemaking on the issue decided by the court. 30 U.S.C. § 957 (1970), 5 U.S.C. §§ 553(e), 559 (1970), 43 CFR 14.1.

Seen for what it quite clearly is, the lawsuit of the Assn. of Bituminous Contractors, Inc., is best described as an end run around statutory proceedings under the Act on behalf of disgruntled litigants who have not exhausted administrative remedies and others who wish to preempt the Secretary in the exercise of his primary jurisdiction through the Board.

In *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965), the Supreme Court, acting in a statutory context procedurally indistinguishable from that under our Act, ruled that where the Congress has provided a statutory procedure, whereby initial review and an adequate remedy may be had at the administrative level with appeal therefrom in the appropriate court of appeals, the doctrine of exhaustion of administrative remedies is applicable and the statutory procedure must be adhered to notwithstanding the absence of an express provision of exclusiveness. More specifically, the Court reversed a decision of the United States Court of Appeals for the District of Columbia Circuit which had sustained the jurisdiction of a district court over a suit for declaratory and injunctive relief against the Comptroller of the Currency with respect to a matter upon which the Comptroller was bound by a decision of the Federal Reserve Board in the exercise of its primary

[8] Under section 105 of the Act, 30 U.S.C. § 815(a) (1970), a contractor cited for a violation with a *notice* can file an application for review so long as the violation is *unabated* in order to contest whether it is an "operator" within the meaning of secs. 3(d) and 104. The same is true, whether or not the violation is abated, if the citation of violation is incorporated in an order of withdrawal.

In *Lucas Coal Company* v. *Interior Board of Mine Operations Appeals*, *supra*, the court of appeals upheld the Board's position on the limitation of direct review at the operator's initiative with respect to notices of unabated violations. The court found the Board's views persuasive because the limitation of review is merely a delay and such limitation encourages prompt abatement and facilitates more expeditious handling of pressing cases.

jurisdiction in a statutory proceeding.[9]

The rationale stated by the Court in its opinion is of particular interest here. By citing and quoting from *Far East Conference* v. *United States*, 342 U.S. 570 (1952), the Court underscored the importance of consistency of regulation which is severely undermined by premature, duplicative litigation in federal courts with de novo review outside the channels of judicial review provided by the Congress. In addition, the Court referred to the differing expertise of administrative and judicial tribunals in highly technical fields which leads the Congress to vest primary jurisdiction in the administrative agency rather than a district court on the theory that a more rational exercise of appellate judicial power and a more comprehensive and correct result are likely to follow. *Compare Assn. of Bituminous Contractors, Inc.* v. *Morton*, *supra*, *with Anning-Johnson & Workinger Electric, Inc.* v. *OSHRC*, *supra*. Finally, the Court emphasized that allowing a choice of initial forum between the administrator and a district court would be unfair because of differing standards prevailing in each and would result in unnecessary expenditures of judicial time in an unfamiliar field.

Any lingering doubt as to the applicability to our Act of the rule applied in *Whitney*, *supra*, requiring exhaustion of administrative remedies and adherence to statutory review procedures instead of seeking a discretionary judicial remedy, has been forcefully dispelled by the recent decision of the United States Court of Appeals for the Fourth Circuit in *Sink* v. *Morton*, — F.2d —, 1975–1976 OSHD par, 20,043 (4th Cir. Sept. 30, 1975).

Sink v. *Morton*, *supra*, like *Assn. of Bituminous Contractors, Inc.* v. *Morton*, *supra*, was a suit for a declaratory and injunctive relief. Sink's complaint concerned a notice of violation and four withdrawal orders issued under sec. 104(c) of the Act. 30 U.S.C. § 814(c) (1970). Although he had invoked the Secretary's statutory review jurisdiction by filing an application for review in the Hearings Division, 30 U.S.C. § 815 (1970), 43 CFR 4.1, Sink contemporaneously pursued his suit in the district court for an injunction against enforcement of the notice and orders and a declaratory judgment that his mine was not subject to the coverage of the Act as set forth in sec. 4, 30 U.S.C. § 803 (1970), or alternatively, that the Act is unconstitutional and unconstitutionally vague. The district court granted partial relief in the form of an injunction against enforcement of the subject notice and withdrawal orders pending the outcome of the administrative proceeding. The court of appeals reversed.

[9] *See* also *Katzenbach* v. *McClung*, 379 U.S. 294, 295–296 (1964), where the Supreme Court indicated that, apart from the question of jurisdiction, a district court should as a matter of discretion deny a declaratory judgment where an adequate remedy exists in a special statutory proceeding.

holding that relief equivalent to that granted by the court below should have been sought from the Secretary through an Administrative Law Judge or the Board, as appropriate. Reasoning as did the Supreme Court in *Whitney*, *supra*, the appeals court concluded that the availability of an adequate administrative remedy in a statutory proceeding, the result of which was reviewable judicially in the first instance in a circuit court, barred a suit for a duplicative remedy in the district court.[10] In stating the rationale for its decision, the court echoed themes which figured prominently in *Whitney*, *supra*. It pointed out that the Congress intended to rely upon the technical and legal expertise of the Secretary and his delegates in the administration of the Act and that the courts in the exercise of their review jurisdiction should defer to the right of the Secretary by his delegates to determine the facts and the law in the first instance in order to be consistent with the legislative intent underlying establishment of statutory review procedures. *See Leg. Hist.*, *supra*, p. 1,034.[11]

In light of *Whitney*, and *Sink* and consistent with the Congressional emphasis upon initial Secretarial determination of claims for relief susceptible to administrative adjudication, I am not willing, in the absence of a compelling order by a court or the Secretary, to acquiesce automatically in the views expressed in a simple declaratory judgment. Certainly, such acquiescence would be clearly contrary to the Secretary's interest in, and policy of, asserting his primary adjudicative jurisdiction to the maximum extent [12] in order to avail himself of the protection afforded by the substantial evidence rule and the judicial habit of deference to a reasoned construction of legislation by the administrator entrusted with its enforcement. *See*, *e.g.*, *Lucas Coal Company* v. *Interior Board of Mine Operations Appeals*, *supra*. Because of the respect the Board owes the federal courts, I am willing to examine the reasoning in support of a declaratory judgment and order, but I do not consider the Secretary bound thereby.

Accordingly, I am of the opinion that, as a preliminary matter, Judge Koutras correctly concluded that the declaratory judgment and order

[10] Temporary or interim relief, as appropriate, on an expedited basis is available at the administrative level. 30 U.S.C. § 815(d) (1970). *See Gateway Coal Company*, 1 IBMA 82, 79 I.D. 102, 1971–1973 OSHD par. 15,372 (1972). 43 CFR 4.514.

[11] In pertinent part, the "Statement of the Managers on the Part of the House," explaining the effect of action agreed upon by the House-Senate Conference Committee, reads as follows:

"* * * it is most important that the Secretary establish a competent legal staff with experience and understanding of this legislation to handle expeditiously litigation not only at the administrative hearing stage, but also at the appellate and district court stage. The highly technical nature and unique conditions and practices that occur in this industry warrant the conclusion that the health and safety of the miners requires not only well-trained and experienced inspectors and administrators, but also a legal staff with experience gained in the handling of such proceedings."

[12] *See Eastern Associated Coal Corp.*, 5 IBMA 74, 82 I.D. 392, 1975–1976 OSHD par. 19,921 (1975).

in *Assn. of Bituminous Contractors, Inc.* v. *Morton, supra*, did not, *by itself*, bind the Department or impair the authority of Secretarial case precedents established by the Board. However, for the reasons set forth above in the Board's opinion and order, I do agree that he erred in not applying the district court's decision under the Acting Secretary's order.

DAVID DOANE,
Chief Administrative Judge.

WEST FREEDOM MINING CORPORATION BLACK FOX MINING AND DEVELOPMENT CORPORATION AH–RS COAL CORPORATION PERRY-ROSS COAL COMPANY

5 IBMA 329

Decided *December 17, 1975*

Cross appeals by West Freedom Mining Corporation, et al., and the Mining Enforcement and Safety Administration from a decision by Administrative Law Judge George A. Koutras, issued March 19, 1975, with respect to the following civil penalty proceedings filed under section 109 of the Federal Coal Mine Health and Safety Act of 1969: Docket Nos. PITT 74–401–P, PITT 74–449–P, PITT 74–455–P, and PITT 74–590–P.

Affirmed in part and reversed in part.

Federal Coal Mine Health and Safety Act of 1969: Notices of Violation: Party to be Charged

An owner-operator of a coal mine, rather than the independent contractor, was properly charged with a violation where its employees were endangered by the violation and it could have removed the hazard with a minimum of effort. Section 3(d) of the Act, 30 U.S.C. § 802(d).

APPEARANCES: Leo M. Stepanian, Esq., for appellant-appellee, West Freedom Mining Corp., et al.; Richard V. Backley, Esq., Assistant Solicitor, and Robert J. Araujo, Esq., Trial Attorney, for appellee-appellant, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG
INTERIOR BOARD OF MINE OPERATIONS APPEALS

The appeal by West Freedom Mining Corporation, *et al.* (West Freedom), Appeal No. IBMA 75–51, of the Administrative Law Judge's decision challenges his finding of violation of 30 CFR 77.410 in five Notices of Violation where bulldozers owned by West Freedom were cited either for not being equipped with back-up alarms or for having inoperative back-up alarms. While agreeing that the Judge's finding of fact was accurate, West Freedom contends that 30 CFR 77.410 is not applicable to bulldozers. This contention was considered and rejected by the Board in *Lucas Coal Company, et al.*, 3 IBMA 258, 81 I.D. 430, 1973–1974 OSHD par. 18,226 (1974), and the Board's decision was affirmed by the United States Court of Appeals for the Third Circuit in *Lucas Coal*

Company, et al. v. *Interior Board of Mine Operations Appeals*, No. 74–1813 (3d Cir. Aug. 29, 1975). In fact, four of these Notices were involved in the application for review which led to the Board's decision in *Lucas*, *supra*. Based upon the foregoing, we are of the opinion that our decision in *Lucas* is dispositive of West Freedom's appeal, that we must affirm the Judge's conclusion that 30 CFR 77.410 had been violated in five instances, and that his penalty assessment of $250 therefor is reasonable and should be sustained.

The Mining Enforcement and Safety Administration (MESA) in Appeal No. IBMA 75–53 appeals the Judge's decision vacating two Notices of Violation, one which alleged a violation of 30 CFR 77.1303 (y) (3) in that blasting lines were not shunted immediately before blasting and the other which alleged a violation of 30 CFR 77.410 in that six coal trucks lacked adequate back-up alarms, and dismissing the respective Petitions for Assessment of Civil Penalty.[1] Since these appeals arose from the same decision, we have consolidated them for consideration.

[1] These violations were contained in the following dockets:

West Freedom Mining Corporation West Freedom Mine Chicora, Pennsylvania	PITT 74–401–P
Black Fox Mining and Development Corporation Black Fox Strip's (Consol. Rottman Pit) Perry Township, Pennsylvania	PITT 74–449–P
AH–RS Coal Corporation AH–RS Coal Tipple Mine Bruin Borough, Pennsylvania	PITT 74–455–P
Perry-Ross Coal Company Brent, Pennsylvania	PITT 74–590–P

Factual and Procedural Background

(IBMA 75–53)

These two Notices of Violation, vacated by the Judge, were issued to owner-operators of the mines involved and cited conditions which these owner-operators contended were the responsibility of independent contractors. With respect to *Notice of Violation No. 1 JLK, June 8, 1972*, which alleged that blasting lines were not shunted prior to detonation, West Freedom contends that it had hired a company to do whatever blasting was needed at the mine. This company only performed the blasting, *i.e.*, it did not drill the blasting holes, nor did it clean up after the detonation. Its responsibility consisted of determining the amount of blasting agent necessary to do the job and preparing and detonating the agent. There was no dispute that this condition existed as alleged.

In his decision, the Judge found that any independent contractor engaged in operations which the Act seeks to control ought to be responsible for adhering to the mandatory standards, and consequently, is the proper party to be assessed civil penalties. Accordingly, he vacated this Notice.

In *Notice of Violation No. 1 CFP, February 9, 1972*, which cited six coal haulage trucks for failure to have back-up alarms, the trucks were owned by the drivers and were on mine property only for the time necessary for loading, approximately 5 minutes. The truck drivers were paid a set fee per ton of coal hauled and West Freedom contends it had no control over the trucks other than to direct the drivers to where the coal is to be loaded. Thus, it should not be assessed penalties for violations present on the trucks.

For the same reason given above, the Judge vacated this Notice with respect to the six coal trucks.

Issue Presented

(IBMA 75–53)

Whether West Freedom was responsible for the violations cited in the two Notices in issue and was properly charged therefor.

Discussion

In the period between the issuance of the Judge's decision and the present, in *Peggs Run Coal Company, Inc.*, 5 IBMA 175, 82 I.D. 516, 1975–1976 OSHD par. 20,033 (1975), the Board held that the phrase "responsible for the violation," as used in *Affinity Mining Company*, 2 IBMA 57, 80 I.D. 229, 1971–1973 OSHD par. 15,546 (1973), must be liberally applied "to effect the primary purpose of the Act—to provide miners with a safe working environment." In *Peggs Run, supra*, we were dealing with an independent coal haulage firm which, by failing to equip its trucks with adequate back-up alarms, endangered miners employed by Peggs Run. Since the Board believed that "with a minimum of diligence" Peggs Run could have prevented such trucks from operating in an area where its employees would be endangered, the Board held that Peggs Run was the proper party to be charged with the violation. Similarly, in the instant case, we are dealing with six driver-owned coal trucks not equipped with adequate back-up alarms and an independent blasting contractor. The Board is of the opinion that the *Peggs Run* rationale applies to both of these violations. The facts of this case are substantially the same as that in *Peggs Run, supra*. Additionally, the hazard created by the blasting operation imposed the duty on West Freedom to make certain that it was performed in a safe manner. In both of these violations miners employed by West Freedom were endangered by hazards which the operator could have prevented or removed from the mine area with a minimum of effort. Accordingly, we hold, notwithstanding the decision of the Judge to the contrary, that West Freedom was responsible for these violations and was the proper party to be charged therefor.

Since the parties stipulated to all of the statutory criteria for deter-

mining the amount of civil penalty except the gravity of the violation, we will adopt this stipulation which is as follows:

1) West Freedom has incurred no violations in the preceding 24 months;

2) West Freedom employs 16 persons to produce 400 tons of coal daily and 138,600 tons of coal annually;

3) West Freedom's ability to continue in business will not be affected by the assessment of civil penalties;

4) All violations were the result of ordinary negligence by West Freedom; and

5) West Freedom exercised good faith in the abatement of all violations.

The Board is of the opinion that the blasting line violation was serious due to the potential for a premature detonation and the consequences thereof upon the safety of miners. Accordingly, we conclude that a penalty of $100 is warranted for this violation.

The record does not indicate the number of people endangered by the trucks without adequate backup alarms nor any other evidence to support a finding that the violation was serious. Accordingly, we find the violation not serious and conclude that a penalty of $50 is warranted therefor.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that:

1) The Judge's decision affirming *Notices of Violation Nos. 1 CFP, February 9, 1972, 1 LCW, April 26, 1972, 1 HB, February 9, 1973, 2 CFP, October 7, 1971,* and *2 CFP October 12, 1971,* and assessing penalties in the total amount of $250 therefor IS AFFIRMED;

2) The Judge's decision vacating *Notices of Violation Nos. 1 JLK, June 8, 1972,* and *1 CFP, February 9, 1972,* IS REVERSED, the Notices ARE REINSTATED, the violations ARE AFFIRMED, and penalties of $100 and $50, respectively, ARE ASSESSED therefor, and

3) West Freedom Mining Corporation, pay penalties in the total amount of $250, Black Fox Mining and Development Corporation pay penalties in the total amount of $50, and Perry-Ross Coal Company pay penalties in the total amount of $100, on or before 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

ZEIGLER COAL COMPANY

5 IBMA 338

Decided *December 17, 1975*

Appeal by Zeigler Coal Company from a decision by Administrative Law Judge Edmund M. Sweeney (Docket No. VINC 73-228-P/4), dated May 7, 1975, assessing a civil penalty in the amount of $500 for one violation of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

Federal Coal Mine Health and Safety Act of 1969: Penalties: Mitigation

Economic losses suffered by an operator as a result of a vacated withdrawal order need not be considered as a mitigating factor in a penalty proceeding arising out of a condition or practice cited in such order where such losses are not affirmatively pleaded at or before the hearing.

Section 109(a) of the Act. 30 U.S.C. § 819(a).

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor, and John H. O'Donnell, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On May 11, 1972, at about 10 a.m., a Mining Enforcement and Safety Administration (MESA) inspector, Harry Greiner, during a regular inspection of Zeigler Coal Company's (Zeigler) No. 4 Mine located in Johnston City, Williamson County, Illinois, issued Order of Withdrawal 1 HG, May 11, 1972, pursuant to sec. 104(c)(1) of the Federal Coal Mine Health and Safety Act of 1969 [1] (Act) for a violation of 30 CFR 75.400, which proscribes the accumulation of loose coal and coal dust in active workings. The order was terminated at 11:15 p.m. of the same day.

In an Application for Review filed by Zeigler the order was upheld by the Administrative Law Judge (Judge). On appeal to this Board the Judge's decision was reversed and the order vacated based on a finding that there was not "a probable risk of serious bodily harm or death." [2]

Zeigler on Feb. 22, 1973, filed a Petition for Hearing and Formal Adjudication of the violation cited in the above-mentioned order, among others. The matter was ultimately assigned Docket No. VINC 73-228-P/4 and was heard on Feb. 25, 1975. At the hearing Zeigler presented no witnesses and offered as evidence only a map of the No. 4 Mine and a copy of the transcript of the hearing regarding the above-mentioned Application for Review of the 104(c)(1) order which was accepted by the Judge only with respect to the testimony of the MESA

[1] 30 U.S.C. §§ 801-960 (1970).

[2] *Zeigler Coal Company*, 3 IBMA 448, 81 I.D. 729, 1974-1975 OSHD par. 19,131 (1974). Decision reaffirmed on reconsideration on May 13, 1975, 4 IBMA 139, 82 I.D. 221, 1974-1975 OSHD par. 19,638.

inspector. Subsequently, on Apr. 7, 1975, Zeigler field Proposed Findings of Fact, Conclusions of Law, and Supporting Brief, in which it alleged for the first time that 654 tons had been lost due to the invalid order resulting in a $3,270 loss of income. On Apr. 10, 1975, MESA filed objections to the Proposed Findings of Fact and the Conclusions of Law in which it urged the Judge to reject any consideration of economic loss. On May 7, 1975, Judge Sweeney issued his decision and assessed a penalty of $500. The decision acknowledged that the order had been vacated; that the coal production in one of the three producing units had been lost for approximately 13¼ hours, and gave consideration to each of the criteria set out in sec. 109(a), including MESA's submission of Zeigler's history of previous violations as well as Zeigler's claim of economic loss due to closure. On May 29, 1975, Zeigler filed a Notice of Appeal. Timely briefs have been filed by Zeigler Coal Company and by MESA.

Contentions of the Parties

The sole contention of Zeigler is that the Judge failed to give adequate consideration to its economic loss suffered as a result of the erroneous issuance of the order of withdrawal. Zeigler contends that $3,000 was lost (without offsetting reduction of labor cost) which should offset the amount of any civil penalty assessed. The fact of the violation is not challenged nor are the findings made pursuant to sec. 109(a)(1) of the Act.

MESA contends (1) that Zeigler failed to affirmatively plead economic loss in mitigation, (2) failed to offer evidence at or before the hearing as to the loss caused by the invalid order, thus depriving it of an opportunity to cross-examine on that point or to offer rebuttal evidence, and (3) that there is no evidence in the record to support any conclusions on lost production or loss of income. Therefore, it urges that the decision of the Judge be affirmed.

Issue Presented

Whether the economic loss resulting from a vacated order was adequately considered.

Discussion

A.

In *North American Coal Corporation*[3] we set out several points for guidance and assistance in implementing the consideration of economic loss as a mitigating factor. Among those points were the following two which are particularly applicable here: (1) the fact that such losses occurred and the duration of the withdrawal orders before termination must be affirmatively pleaded by the operator in the subject penalty proceeding; otherwise the Judge need not consider the losses as a mitigating factor; and (2) a Judge has the discretion to as-

[3] 3 IBMA 93, 81 I.D. 204, 1973–1974 OSHD par. 17,658 (1974).

sign whatever weight to such mitigating factor as he deems just or appropriate under the circumstances of each case.

As to the first point, we find that Zeigler failed to affirmatively plead economic loss and cannot now be heard on that issue. Zeigler's prehearing pleadings made no mention of economic loss in mitigation nor did it raise the issue during the hearing. The first time it was raised was in proposed findings filed subsequent to the hearing. However, the record does contain the fact that the withdrawal order was subsequently vacated and the time of issuance and time of termination of the order, approximately 13¼ hours. We feel that this record contained sufficient information to substantiate a finding that some production was lost. Since we indicated in *North American* that the exact dollar amount of the loss was not relevant the record here could be considered to support some mitigation.

The decision of the Judge reflects that he was fully aware that the order had been vacated by this Board, and that one of Zeigler's three producing units had been closed for approximately 13¼ hours. (See Findings of Fact 7 and 9, Dec. 7.) In fact, the Judge specifically stated, "Consideration has been given here to each argument by each party on the question of the criteria set out in sec. 109(a)(1), including MESA's submissions on previous Zeigler violations and Zeigler's claim of economic loss due to the closure." (Dec. 5.)

Furthermore, the decision supports the Judge's findings that the violation was both serious and the result of negligence by the operator.

In our view the record is unclear as to whether the Judge failed to consider economic loss or did in fact consider it but gave it little weight.

We will affirm the decision on the grounds that the failure of Zeigler to affirmatively plead economic loss in mitigation forecloses its argument and that the Judge did not abuse his discretion or judicial prerogative if in fact he gave no weight to economic loss. Upon review of the entire record we find and conclude that the penalty assessed is reasonable and supported by the facts even when giving Zeigler the benefit of doubt on the question of economic loss.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in the above-captioned case IS AFFIRMED. IT IS FURTHER ORDERED that Zeigler Coal Company pay the penalty assessed, in the amount of $500, within thirty days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

APPEAL OF COMMONWEALTH ELECTRIC COMPANY

IBCA-1048-11-74

Decided *December 18, 1975*

Contract No. 14-03-3217A Bonneville Power Administration.

1. Rules of Practice: Appeals: Generally—Rules of Practice: Appeals: Discovery

Where a contract for the construction of a powerline contained two rates for the erection of tower steel and the contractor, contending that the contract was ambiguous (which was admitted by the Government in part), claimed additional compensation at the higher helicopter erection rate and filed a request for the production of documents in nine separate categories which request was opposed by the Government principally upon the ground that the documents were irrelevant to any issue in the appeal, the Board, following the rule that it is not a valid objection that information sought in discovery proceedings may not be admissible at the hearing if the request appears reasonably calculated to lead to the discovery of admissible evidence, grants appellant's request in principal part.

APPEARANCES: Mr. Allen L. Overcash, Attorney at Law, Woods, Aitken, Smith, Greer Overcash & Spangler, Lincoln, Nebraska, for the appellant; Mr. David E. Lofgren, Department Counsel, Portland, Oregon, for the Government.

INTERIOR BOARD OF CONTRACT APPEALS

Order Ruling Upon Objections to Request for Production of Documents

The captioned contract for the construction of a powerline which traversed the Washington-Oregon Boundary contains two items for the erection of tower steel for each of which the unit is pounds: No. 35, erect tower steel and No. 36, erect tower steel by helicopter. The claim is for erection of tower steel at the helicopter unit price on the Washington side of the line whereas that allowed by the contracting officer was only on certain towers in Oregon.

By letter, dated Oct. 3, 1975, appellant's counsel filed with the Board a request for production of documents in nine separate categories allegedly relevant to issues in the appeal. Department counsel has opposed the request, asserting, *inter alia*, that the documents are not relevant to any issues in the appeal, that certain of the requested documents are privileged, that the request is unduly burdensome and that appellant is engaged in a fishing expedition rather than a genuine effort to obtain documents related to the claim involved in the appeal.

[1] We will consider the categories of documents in the request and the Government's opposition thereto seriatim.

Request No. 1:

All documents relating to the use or potential use of a helicopter for the erection or partial erection of the transmission line towers on Contract No. 14-03-3217A for construction of Hanford-Ostrander 500 KV Line No. 1, Schedule IIB (the "Project").

Explaining this request, appellant alleges that the conditions of the

project encouraged, if not required, the contractor to use a helicopter for the erection of as many towers as possible and that the Government knew or should have known this prior to bidding. The Government's denial of this allegation is cited in support of the request. Appellant has also alleged that it reasonably understood that all erection by helicopter would be paid for at the unit price for helicopter erection. Alternatively, appellant has alleged that the specifications were misleading and therefore defective.

Contending that the specifications are clear and unambiguous as to the towers upon which the helicopter method of erection was mandatory and that other methods of erection were permissible on the remaining towers, the Government asserts simply that the documents covered by this request have no bearing on the issue in the appeal, which is whether appellant is entitled to payment at the helicopter rate for all steel erected by that method.

Answering the Government's objection to this request (enclosure to letter, dated Nov. 24, 1975), appellant alleges that during the performance of the work the Government's position as to the particular towers for which the payment provisions for helicopter work were applicable varies from that now taken by the contracting officer in the findings of fact. Appellant asserts that if the payment provisions for helicopter erection were, in fact, intended to apply only to certain towers, the Government must have documents in its possession reflecting that position. The Government has admitted (Answer, Par. 8) that a tower not listed as required to be erected by helicopter was paid for at the helicopter erection rate because of an ambiguity in the specifications.

We reject the Government's contention. To begin with, the concept of relevancy in discovery proceedings is broader than that governing the admissibility of evidence at a trial or hearing, and it is not a valid objection that the information sought may not be admissible at the trial or hearing if the request appears reasonably calculated to lead to the discovery of admissible evidence. *Ingalls Shipbuilding Division, Litton System, Inc.*, ASBCA No. 1717 (Aug. 16, 1973), 73–2 BCA par. 10,205 at 48,096.

Applying this rule in the light of appellant's allegations, we think it evident that documents relating to the use or potential use of a helicopter on the line in question might be relevant to the issue of ambiguous specifications (partially admitted by the Government) or to the issue of the alleged misleading or defective specifications. In any event, we are not prepared to hold that the documents in question would not lead to the discovery of admissible evidence relating to the above issues. Accordingly, this request is granted.

Request No. 2:

All documents relating to the drafting or preparation of those provisions of the specifications or computations of bid quantities or determination of bid units

or methods of payment or engineering estimates for the Project that relate to the following items of work on the Project: erection of the steel towers or payment therefore [*sic*] excavation for footings or payment therefore [*sic*]; removal of line facilities or payment therefore [*sic*].

In explanation of this request, appellant refers to the allegation in its complaint that since the specifications did not limit payment for erection at the helicopter rate to those towers for which helicopter erection was required, it is entitled to payment at the helicopter rate for all steel set by helicopter. Appellant contends that this conclusion was strengthened by provisions of the specifications providing that payment for erection of steel towers would be made at the unit price and payment for helicopter erection work would be made at the unit price for erection by helicopter. Appellant again relies on a provision in the specifications assertedly encouraging the use of a helicopter at other than the designated towers which is as follows:

This specification designates certain areas where helicopters shall be used for removal and erection of steel towers. In other areas of limited or prohibited ground access the use of helicopters for logging, line removal, and construction is the preferred method.

The Government's answer denies the validity of appellant's arguments, asserting that the quoted provision must be read in the context of the contract as a whole, that special environmental considerations dictated the use of only the helicopter method of erection on certain towers in Oregon and that appellant's use of a helicopter on other towers was a voluntary act on its part. The Government also argues that appellant, in relying on the quoted section of the specifications, has ignored the limiting words, "In other areas of limited or prohibited ground access * * *," which were not applicable to towers to be erected in Washington.

Appellant states that it has attempted to read the contract as a whole and seriously doubts if documents in the Government's possession support the Government's contentions. Opposing the request, the Government argues that there is no apparent connection between the claim and the material described in the request. However, it, nevertheless, asserts that quantities of work on this contract came out remarkably close to estimates contained in the bid schedule.

Amplifying the basis for this request, appellant refers to page 7 of the findings wherein the contracting officer found, in essence, that based on weights of the towers shown in the drawings, bidders should have been able to relate the tower numbers for which helicopter erection was specified to the approximate weight shown in the bid schedule (Item 36) and thus develop a unit price therefor. The same conclusion was reached with respect to the balance of the erection (Item 35), where, according to the Government, the method of erection was

left to the contractor's option. The contracting officer determined that the approximate weights in the schedule were directly relatable to requirements in the specifications and that except for the adjustment for Tower 157/1, for which payment at the helicopter erection method was allowed, actual quantities erected under Items 35 and 36 were very close to the estimates.

Appellant asserts that if the Government is permitted to capitalize on an assertion of a close relationship between bid quantities and other provisions of the contract, appellant is certainly entitled to examine Government documents relating to the computation of bid quantities and the other matters (determination of bid units, methods of payment or engineering estimates) covered by Request No. 2.

We agree with appellant that the Government cannot rely on an asserted close relationship between estimated weights which are allegedly directly relatable to requirements of the specifications and actual weights, while denying the relevance of computations upon which the estimates were based. The requested data concerning other bid items (excavation for footings and removal of line facilities) is not as clearly relevant. However, since appellant relies on certain provisions of the specifications relating to those items to support its contention that the contract as a whole supports its position, we grant this request in its entirety.

Request No. 3:

All documents that relate to the selection of the length of time for construction of the project.

Explaining this request, appellant refers to the allegations in its complaint that award was made on Mar. 8, 1973, that notice to proceed was issued effective March 12, 1973, and that the work was to be completed by October 18, 1973. Appellant has alleged that the Government has denied that this was a short construction schedule considering the difficult nature of the work. Appellant asserts that it is generally recognized that erecting steel towers by helicopter is faster than by motorized crane and contends that the short construction schedule was one of the conditions which practically encouraged and required the use of a helicopter.

Appellant states that it needs to review the documents in question to determine if they support the Government's position. Opposing the request, the Government argues that whether the construction schedule is considered to be long or short is largely a subjective matter, that it was up to any firm submitting a bid to determine how to accomplish the work in the time allowed and that the documents described in the request are not relevant to the issue in the appeal.

While we recognize the force of the Government's contention that the work could have been prosecuted in Oregon and Washington simultaneously, a contractor may not be expected to commit men and

equipment to a project which are unreasonable in relation to the dollar value thereof, and we are simply not prepared to hold at this juncture that the time allotted for performance of the work is irrelevant to any issue in the appeal. In this connection, it would appear that an appropriate means of determining whether time allowed for performance of the instant contract was long or short would be to compare the schedule for similar projects. This request is granted.

Request No. 4:

All documents related to the use of helicopters for fire prevention and fire protection on the Project.

In Paragraph Six of its complaint appellant alleges that it used the helicopter method to erect a number of towers in addition to those required by the contract to be erected by that method, that this benefited the Government by speeding completion of the work and avoiding delays resulting from damage to the environment and the danger of fire. Appellant has also alleged that the Government benefited from the fire prevention capabilities of the helicopter since the specifications required the contractor to provide a water bucket for use with the helicopter at all times a helicopter was utilized on the project. The Government has denied that any benefit necessarily accrued to the Government from use of the helicopter on other than the required towers and contends that, in any event, any alleged benefit is irrelevant to the issue in the appeal.

As support for the request, appellant asserts that some substantive benefit must have accrued to the Government from the fire protection provisions, or the provisions referred to would not have been included in the contract. Appellant contends that the requirement that the helicopter have a fire prevention capability is inconsistent with the Government's position it should not be compensated for use of the helicopter. The Government argues that the mere fact that appellant, acting as a volunteer, conferred an alleged benefit upon the Government does not subject the Government to liability therefor and that the specifications speak for themselves.

We think the purpose of having a water bucket for use with a helicopter available at all times the helicopter was used on the project is sufficiently obvious that production of documents relating thereto, assuming they exist, would serve no useful purpose. In the absence of further justification, this request is denied.

Request No. 5:

All documents relating to or describing or evaluating or referring to the Contractors [*sic*] plan of work for the project described in the Contractor's letter of May 4, 1973.

Since the Government states that no documents covered by this request exist, there is no point in discussing the contentions of the parties relating to appellant's work plan.

Request No. 6:

All documents related to partial or fianl [*sic*] payment for the erection of steel towers on the Project including but not limited to all documents in the possession of Mr. Al Leonard, an official of the Bonneville Power Administration.

In explanation of this request, appellant refers to the Government's answer wherein it is alleged that the Government accepted appellant's bid for performing the work at the stated bid prices—$.40 per lb. for Item 36 for erecting towers required to be erected by the helicopter method (Towers 154/1 to 157/1) and $.22 per lb. for the remainder. The Government has also asserted that payment was made on several partial payment estimates. Appellant asserts it needs to examine the documents in question to trace the source of the Government's position that the provisions of the contract applicable to helicopter work only required payment at the helicopter rate for certain numbered structures and to ascertain how the decision to make payment at the helicopter or other erection rate was made. The Government, opposing the request, states that there appears to be no basic disagreement as to the total quantity of steel erected except as to the amount erected by crane on the Washington side, that the partial payment estimates have previously been shown and explained to appellant and that the documents in question are not essential to prosecution of the appeal.

While documents relating to partial or final payment would appear to be irrelevant to the matter of the acceptance of appellant's bid and we will not allow discovery to be used to harass or annoy an opposing party, *i.e.*, by repeated requests for documents which are available to or already in the possession of the opposing party, the Government admits to some disagreement as to the amount of steel erected by crane on the Washington side. In addition, documents relating to partial or final payment may further explain the Government's decision to allow payment at the helicopter erection rate for an additional tower. This request is granted.

Request No. 7:

All documents relating to the Contractor's claim for additional payment for helicopter erection, consideration of that claim and the Contracting Officer's decision on the claim.

In justification of this request, appellant has asserted that the central issue in this appeal is the veracity of the contracting officer's decision and that it is entitled to review documents relating to the Government's consideration of its claim. The Government argues that these documents are privileged as internal memoranda, material and working papers not available to an adverse party in litigation.

The Government's claim of privilege may not be so readily accepted. Questions of privilege are normally determined only after an in camera review of the documents in question. *See Power City Construction and Equipment, Inc.*, IBCA–490–4–65 (July 17, 1968), 75 I.D. 185, 68–2 BCA par. 7126; *Ingalls, supra*,

and *Carl W. Olson & Sons Co.*, IBCA–930–9–71 (Apr. 4, 1974), 81 I.D. 157, 74–1 BCA par. 10,564. This request is granted. The Government is directed to make available to the Board for in camera review copies of any documents covered by this request or portions thereof considered to be privileged together with a statement of reasons in support of the claim of privilege.

Request No. 8:

All specifications issued by issued by [*sic*] Bonneville Power Administration within five years previous to the Project which provided for different payments for the same or similar work depending upon the method of construction used by the Contractor including but not limited to payments the amount of which depended upon the use or non use [*sic*] of a helicopter.

Justifying this request, appellant refers to the allegation in its complaint that on similar projects with similar contract provisions the Government had paid for all helicopter erection work at the helicopter erection price. The Government has, of course, denied this allegation. Appellant argues that the other specifications would conclusively show that its interpretation at the time of bidding was correct. Opposing the request, the Government states that other specifications are irrelevant to what the contract in this instance required and that, in any event, the request is unduly burdensome.

We grant the request limited to other specifications, if any there be, issued within the 5-year period preceding the instant contract wherein the helicopter method of erecting towers was mandatory on a powerline or any portion thereof. Our rationale follows. We have admitted in evidence specifications under other contracts as relevant to the reasonableness of a contractor's interpretation of allegedly ambiguous specifications. *See Allison & Haney, Inc.*, IBCA–587–9–66 (July 24, 1969), 69–2 BCA par. 7807 at 36,262. All discovery is to some degree burdensome and the mere fact that compliance will place a burden on the party against whom discovery is directed is not a valid objection. *See JB & C Company*, IBCA–1020–2–74 and 1033–4–74 (Dec. 11, 1974), 75–1 BCA par. 11,017. If locating the particular specifications as to which we have granted the request is regarded as too burdensome, the Government may satisfy its obligations in this regard by making the files in which the specifications may be located available to appellant. *See Carl W. Olson & Sons, Co.*, IBCA–930–9–71 (Oct. 15, 1973), 73–2 BCA par. 10,269.

Request No. 9:

All documents relating to environmental considerations, or restrictions on the Project.

Appellant's justification for this request is again based on the allegation, denied by the Government, that the contractor was encouraged, if not required, to use a helicopter on the erection of as many steel

towers as possible and that the Government knew, or should have known, this prior to the bidding. The alleged encouragement is related to the allegations that the helicopter method of erecting steel towers has hardly any impact on the environment, while use of a motorized crane, necessitating construction of access roads and pads, will likely damage the environment. Opposing the request, the Government asserts that the alleged encouragement must be found in the contract provisions or in actions of the contracting officer or his authorized representative, that such constructive encouragement has not been alleged and that the documents requested are simply not relevant to the issue in the appeal. Appellant argues that as long as the Government persists in its denial that the contract as a practical matter required the widespread use of a helicopter, environmental restrictions will be in issue in the appeal.

Since the Government has admitted an ambiguity in the specifications as to the applicability of the helicopter erection rate to one tower and has alleged (Answer, par. 4), that very special environmental considerations were applicable to certain towers, we cannot accept the Government's contention that documents relating to environmental considerations are irrelevant to any issues in the appeal. This request is granted.

Conclusion

Appellant's requests for documents are granted to the extent indicated and otherwise denied. The Government is directed to make the documents or the files in which the documents may be located available for inspection and copying at a time and place to be agreed upon by counsel. If the Government considers that any documents as to which we have granted the request are privileged, it is directed to submit the documents to the Board for in camera review together with a statement of reasons in support of the claim of privilege.

SPENCER T. NISSEN,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

ZEIGLER COAL COMPANY

5 IBMA 346

Decided *December 18, 1975*

Appeal by Zeigler Coal Company from a decision dated June 26, 1975, by Administrative Law Judge Paul Merlin upholding the validity of a withdrawal order issued pursuant to sec. 104(c)(2) and denying an Application for Review in Docket No. BARB 75-613.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Review of Notices and Orders: Generally

The validity of the precedent notice and order is not in issue in a proceeding for review of an Order of Withdrawal issued pursuant to sec. 104(c)(2) of the Act.

2. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Withdrawal Orders: Generally

An Application for Review of a sec. 104 (c) (2) withdrawal order is properly denied where the evidence shows that a violation occurred, that the condition or practice cited posed a probable risk of serious bodily harm or death, but short of imminent danger, and also, that the operator demonstrated a reckless disregard for the health and safety of the miners.

APPEARANCES: J. Halbert Woods, Esq., for appellant, Zeigler Coal Company; Thomas A. Mascolino, Assistant Solicitor, and David L. Baskin, Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY CHIEF ADMINISTRATIVE JUDGE DOANE

INTERIOR BOARD OF MINE OPERATIONS APPEALS

On Dec. 19, 1974, Withdrawal Order No. 2 CED was issued in Zeigler Coal Company's (Zeigler) No. 9 Mine in Madisonville, Kentucky. The order was issued pursuant to sec. 104(c) (2) of the Federal Coal Mine Health and Safety Act of 1969 (Act) [1] and cited the following condition:

The approved roof-control plan was not being followed in that posts were not set in crosscuts as required at numerous locations in the supply-haulage entries in the main north, main east off main north and No. 1 east off main north; posts were not set in the main east belt-conveyor entry for a distance of approximately 20 feet adjacent to the roof fall in the main east supply entry; seven posts were missing from under five crossbars placed under brows where a roof fall occurred, two crosscuts outby the face of No. 2 entry, on No. 3 unit, main south off main east; and supplemental support had not been installed where adverse roof conditions were observed for approximately 35 feet inby the fall area at the second crosscut outby the face of No. 2 entry, No. 3 unit, main south off main east.[2]

The order was terminated on Jan. 7, 1975. The actions taken to abate the above conditions were described as follows:

Posts were set in crosscuts as required in the main north and No. 1 east supply entries. The main east and main south off main east panels were abandoned. Conferences were held, and the approved roof control plan was discussed with the persons involved by the principal officer in charge of health and safety in the presence of [the] inspector.[3]

On Jan. 13, 1975, Zeigler filed an Application for Review of the above withdrawal order as well as the underlying sec. 104(c)(1) order 1 DNG, Sept. 11, 1974, and the antecedent notice, No. 1 DNG, Sept. 10, 1974. On Jan. 29, 1975, the Mining Enforcement and Safety Administration (MESA) filed a motion for

[1] 30 U.S.C. §§ 801–960 (1970).

[2] The roof control regulation, 30 CFR 75.200, provides in relevant part:

"Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs. A roof control plan and revisions thereof suitable to the roof conditions and mining system of each coal mine and approved by the Secretary shall be adopted and set out in printed form * * *."

[3] Government Exhibit No. 5.

partial dismissal of the Application for Review insofar as it sought review of the underlying sec. 104(c)(1) notice and order. By order dated Feb. 21, 1975, the Administrative Law Judge (Judge) granted the motion for partial dismissal on the ground that with respect to the sec. 104(c)(1) notice and sec. 104(c)(1) order, the Application for Review was not timely filed.

At the hearing held on Apr. 18, 1975, in Arlington, Virginia, the Judge affirmed his order granting partial dismissal and testimony was limited to Order of Withdrawal No. 2 CED, issued on Dec. 19, 1975.

The Judge found in his decision that Zeigler had not complied with its roof control plan and that dangerous roof conditions existed in several of the areas cited in the order.[4] He found specifically that timbers were not spaced according to the plan, or were knocked out or missing, that previous roof falls had occurred in several areas covered by the order, that there was loose, sagging, or cracking roof in at least two locations, and that all of these conditions were obvious and perilous to the extent that miners were leaving the subject areas of their own volition. Accordingly, the Judge concluded that the operator's failure to comply with its roof control plan was unwarrantable and contributed significantly and substantially to the cause and effect of a mine safety or health hazard. He therefore held that the order of withdrawal was properly issued.

Contentions of the Parties

Zeigler's first contention on appeal is that the underlying sec. 104(c)(1) notice and order should be reviewable in the instant proceeding. Zeigler concedes that its Application for Review was filed more than 30 days after the underlying notice and order were issued, but argues that it adequately preserved its right to challenge these documents by contesting their validity in the instant Application for Review.

Zeigler also contends that its departures from its roof control plan did not constitute a violation of a mandatory health or safety standard.

Finally Zeigler alleges that the record does not disclose evidence which would justify the conclusion of hazard and unwarrantable failure.

MESA contends that the Application for Review was properly dismissed insofar as it pertained to the underlying sec. 104(c)(1) notice and order.

MESA also contends that the conditions cited in the order were the result of an unwarrantable failure to comply and contributed significantly and substantially to a mine safety or health hazard.

[4] The inspector testified that the roof in the main east belt conveyor entry and in a specifically described area of No. 3 unit (Main South off Main East) was loose and sagging. In the latter location, "the roof had been working for several hours" (Tr. 37). The inspector stated that the roof in the conveyor entry "could fall at any time." (Tr. 31.) However, no imminent danger withdrawal order was issued, and the parties stipulated at the hearing that no imminent danger was present.

Issues on Appeal

A. Whether the validity of a sec. 104(c)(1) notice and order may be reviewed in a proceeding for review of an order of withdrawal issued pursuant to sec. 104(c)(2) of the Act.

B. Whether the Judge erred in upholding the validity of Order of Withdrawal No. 2 CED issued pursuant to sec. 104(c)(2) of the Act.

Discussion

A.

[1] Prior to filing its application in the instant case, Zeigler had not challenged the validity of issuance or the truth of the allegations contained in the underlying notice or order. Since the validity of the underlying citations was not properly put in issue by timely challenge, Zeigler must be held to have waived review thereof and cannot be heard to the contrary in the instant proceeding to review a subsequent sec. 104(c)(2) order. *Kentland-Elkhorn Coal Corporation*, 4 IBMA 166, 82 I.D. 234, 1974–1975 OSHD par. 19,633 (1975), and cases therein cited.

B.

[2] This Board has repeatedly held that individual provisions of roof control plans are enforceable as mandatory standards [5] in the mine for which the plan is approved. Zeigler's argument with respect to enforceability is therefore without merit. Similarly devoid of substance is Zeigler's contention that there were no hazards and no unwarrantable failure. The record, which demonstrates that the operator displayed a serious lack of diligence in failing to comply with its roof control plan, is overwhelmingly to the contrary. We find that the record shows a reckless disregard by the operator for the safety of the miners and thus supports the Judge's finding of unwarrantable failure. We must conclude that Zeigler has demonstrated no reason why the findings of fact, conclusions of law, and decision of the Judge should not be affirmed. Accordingly, we hold that the Judge properly upheld the validity of the subject withdrawal order.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the Judge's decision and order in the above-captioned case ARE AFFIRMED.

DAVID DOANE,
Chief Administrative Judge.

I CONCUR:

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

[5] *Zeigler Coal Company*, 5 IBMA 132, 82 I.D. 441, 1975–1976 OSHD par. 19,998 (1975) and cases there cited.

ZEIGLER COAL COMPANY

5 IBMA 356

Decided *December 19, 1975*

Appeal by Zeigler Coal Company from a decision by Administrative Law Judge Paul Merlin (Docket Nos. BARB 75-617 and BARB 75-651-P), dated June 24, 1975, denying an application for review filed by Zeigler Coal Company and granting a petition for civil penalty assessment filed by the Mining Enforcement and Safety Administration. The decision upheld the validity of a sec. 104(a) Order of Withdrawal and assessed civil penalties in the amount of $2,350 for nine violations pursuant to sec. 109(a)(1) of the Federal Coal Mine Health and Safety Act of 1969.

Affirmed.

1. Federal Coal Mine Health and Safety Act of 1969: Unwarrantable Failure: Withdrawal Orders: Imminent Danger

Conditions or practices specified in an order should be considered collectively for the purpose of determining imminent danger. 30 U.S.C. § 814 (1970).

2. Federal Coal Mine Health and Safety Act of 1969: Penalties: Mitigation

Where a withdrawal order is found to be validly issued, economic loss due to such order is properly excluded from consideration as a mitigating factor in determining a penalty assessment pursuant to sec. 109(a) of the Act.

APPEARANCES: J. Halbert Woods, Esq., for appellant Zeigler Coal Company; Thomas A. Mascolino, Esq., Assistant Solicitor, David L. Baskin, Esq., Trial Attorney, for appellee, Mining Enforcement and Safety Administration.

OPINION BY ADMINISTRATIVE JUDGE SCHELLENBERG

INTERIOR BOARD OF MINE OPERATIONS APPEALS

Factual and Procedural Background

On Jan. 15, 1975, Mining Enforcement and Safety Administration (MESA) Inspector Charles E. Dukes inspected the No. 2 Section of the Zeigler Coal Company's (Zeigler) No. 9 Mine and issued Order of Withdrawal No. 1 CED pursuant to sec. 104(a) of the Federal Coal Mine Health and Safety Act of 1969 (Act).[1] Inspector Dukes described the conditions or practices in the order with the following:

> Violations of 75.400, 75.517, 75.514, 75.515, 75.100-2, 75.1104, 75.1106-3, 75.-1100-3, and 75.1306 existed on No. 2 unit, north rooms, No. 1 east, main north: accumulations of oil, grease, and coal dust were present on the ratio-feeder, loading machine, two shuttle cars, 2 roof-bolting machines, and the coal drill, and accumulations of paper and cardboard boxes were present near the transformer and the crosscut adjacent to the transformer with some cardboard boxes stacked on power cables near the transformer. Accumulations of loose coal and coal dust

[1] 30 U.S.C. §§ 801-960 (1970).

were present in the shuttle car roadway in No. 4 room for a distance of approximately 200 feet, and in the roadway in the last row of open crosscuts from Nos. 1 through 6 rooms, along the ribs in the crosscut left in No. 1 room, and the crosscut right in the No. 6 room, and in the roadway for a distance of approximately 25 feet in the No. 6 east entry, 50 feet outby No. 4 room (75.400). The outer jacket at one location on the loader trailing cable was damaged and had not been reinsulated (75.517). The power wires entering the ratio-feeder conveyor motor were not reinsulated at least to the same degree of protection as the remainder of the wire (75.514). Insulated wires passing through the metal frame of the ratio-feeder control box did not enter through the proper fittings (75.-515). The belt-conveyor control wire near the ratio-feeder was not installed on insulators, and was contacting wooden boards and posts (75.516). The fire hose provided at the section loading point was not long enough to reach all working faces (75.1100-2). Lubricating oil and grease were present at numerous locations along the ribs and were not in closed containers, with some being present in proximity to energized power cables (75.1104). Two compressed gas cylinders were not secured against being accidentally tipped over and the cap to protect the valve was missing from the acetylene gas cylinder (75.1106-3). The fire extinguisher provided at the transformer was inappropriate (75.1100-3). The section explosive storage magazine had metal exposed on the inside and was located 5 feet from an energized power cable suspended from the roof (75.1306).

Sample Nos. 1, 2, 3, 4, 5, and 6 were collected to substantiate this violation.

The area of the mine closed was: "Working section, north rooms, No. 1 east, main north." The order of withdrawal was terminated by Order No. 1 JER, Jan 16, 1975.

On Apr. 14, 1975, Administrative Law Judge Paul Merlin (Judge), pursuant to a motion by Zeigler issued an order consolidating Zeigler's application for review in Docket No. BARB 75-617 with MESA's petition for assessment of civil penalty in Docket No. BARB 75-651-P. On June 24, 1975, the Judge issued his decision in which he found the sec. 104(a) Order of Withdrawal valid, denied the application for review, and assessed civil penalties in the amount of $2,-350 for nine violations of the Act.

Zeigler Coal Company filed a timely notice of appeal on July 17, 1975. Zeigler filed a four-page brief to which it attached its proposed findings of fact and conclusions of law it submitted to the Judge and requested the Board to refer thereto particularly with respect to the question of imminent danger. MESA filed a timely reply brief with this Board.

Contentions of the Parties on Appeal

In its brief on appeal, Zeigler makes three assertions. First, it alleges that the violations cited in the order were insignificant and unrelated and considered either independently or together do not constitute or contribute to an imminently dangerous situation. No specific objection was made as to the validity of the findings of violation of the Act or penalties assessed for specific violations found by the Judge. Second, Zeigler con-

tends that its loss of $7,000 in gross revenues as a result of the issuance of the order should completely mitigate the $2,350 assessment made by the Judge. Zeigler's third contention challenges the promulgation of the standards but acknowledges the Board's prior pronouncements that it is without jurisdiction to determine the validity of Departmental regulations. Since this question is raised by Zeigler for protective purposes only no further consideration will be given it herein.

In its reply brief MESA asserts that the various violations cited in the order presented a hazard of fire and explosion and with the inadequacy of fire fighting equipment constituted an imminent danger. It is alleged that Zeigler has presented no reasons why the Judge's finding should be reversed and in absence of showing that the evidence compels a different result, it should not be disturbed. Next MESA points out that Zeigler has failed to contest any of the findings of violations. It asserts that the findings of fact with respect to the existence and gravity of each violation are supported by the record and should not be disturbed absent a showing that the evidence compels a different result.

Issues Presented

Do the conditions or practices as found by the Judge constitute imminent danger?

Should the loss of $7,000 in gross revenues precipitated by the order of withdrawal be considered in mitigating the penalties assessed?

Discussion

Having reviewed the record and considered the briefs submitted by Zeigler and MESA, we find that Zeigler has not demonstrated any reason why the findings of fact, conclusions of law and decision of the Judge as to the facts of violation should not be affirmed. The record also supports the decision and order of the Judge regarding the amounts assessed for each of the nine violations of the Act in light of proper consideration of the six statutory criteria in sec. 109(a)(1) of the Act.

[1] With respect to the withdrawal order issued pursuant to sec. 104(a) the Judge stated that: "The accumulations of so many kinds of combustible materials, some of which were on the equipment itself, together with the lack of full insulation on several wires going to the equipment, meant that the materials necessary to constitute a fire were present all at the same time and place with the potential sources of the ignition." The Judge also indicated that the absence of proper fire fighting equipment and the potential explosion of the acetylene cylinder and explosives further increased the danger. We agree and consider it immaterial to the decision herein whether each of the conditions individually would constitute an imminent danger.

This Board has held and the United States Circuit Courts of Appeal for both the 4th and 7th Circuits have affirmed that imminent danger exists when the condition(s) is:

> * * * of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.[2]

Zeigler raises one point with which we agree. Where a condition, such as the insulation deficiency cited by the inspector in the instant case as a violation of 30 CFR 75.517, is abated prior to the issuance of an imminent danger withdrawal order, it cannot properly be considered to contribute to the imminent danger.[3] However, even excluding that insulation deficiency (30 CFR 75.517) from our consideration we still find that it was more probable than not that the feared accident or disaster would have occurred before elimination of the dangers.

[2] Zeigler's contention that the $7,000 loss in gross revenues should be considered in mitigation of the penalties assessed is without merit since the 104(a) order was found to have been properly issued. In *North American Coal Corporation*, 3 IBMA 93, 81 I.D. 204, 1973–1974 OSHD par. 17,658 (1974), we held that economic loss is to be considered as a mitigating factor only in those cases where the order of withdrawal involved had been vacated prior to the sec. 109(a)(1) penalty proceeding being adjudicated, or was invalidated in sec. 105(a)(1) review proceeding consolidated with the subject penalty proceeding. Therefore, no mitigation of the penalties assessed in this case is appropriate on the grounds suggested.

ORDER

WHEREFORE, pursuant to the authority delegated to the Board by the Secretary of the Interior (43 CFR 4.1(4)), IT IS HEREBY ORDERED that the decision in the above-captioned case IS AFFIRMED. IT IS FURTHER ORDERED that Zeigler Coal Company pay the penalties assessed, in the total amount of $2,350, within 30 days from the date of this decision.

HOWARD J. SCHELLENBERG, JR.,
Administrative Judge.

I CONCUR:

DAVID DOANE,
Chief Administrative Judge.

[2] *Freeman Coal Mining Company* v. *Interior Board of Mine Operations Appeals, et al.*, 504 F. 2d 741 (7th Cir. 1974), *Eastern Associated Coal Corp.* v. *Interior Board of Mine Operations Appeals*, 491 F. 2d 277 (4th Cir. 1974).

[3] We indicated in *Eastern Associated Coal Corporation*, 1 IBMA 233, 236, 79 I.D. 723, 1971–1973 OSHD par. 15,388 (1972), that in order to minimize argument it would be a better practice to limit the specifications in a sec. 104(a) imminent danger withdrawal order to those conditions or practices actually constituting the imminent danger and to cite other violations in separate notices of violation. That remains the position of the Board.

ESTATE OF LOUIS HARVEY QUAPAW

4 IBIA 263

Decided December 23, 1975

Appeal from an Administrative Law Judge's order determining heirs after rehearing.

Affirmed.

1. Indian Probate: Appeal: Matters Considered on Appeal—130.4

Jurisdiction is fundamental to the Board's reviewing authority and it will be examined on appeal even though not raised as an issue previously.

2. Indian Probate: Secretary's Authority: Generally—381.0—Indian Probate: Trust Property: Generally—415.0

The Act of June 25, 1910 (36 Stat. 855), 25 U.S.C. § 372 (1970), gives the Secretary of the Interior statutory authority to determine heirship whether an estate is a trust allotment or a restricted allotment.

3. Indian Probate: Secretary's Authority: Generally—381.0

The Act of June 25, 1910, confers jurisdiction upon the Secretary to determine heirs beyond a proceeding involving the original allottee. The Secretary's responsibility under the Act is to determine heirship of all Indians who die intestate possessed of trust or restricted property and such responsibility does not terminate until the trusteeship or period of restriction expires.

4. Indian Lands: Allotments: Generally

The Quapaw Indians were allotted under the Act of Mar. 2, 1895, 28 Stat. 876, 907. The initial period of restrictions against alienation contained in this Act was extended by subsequent amendments to Mar. 3, 1971.

5. Indian Probate: Generally—100.0

Indians specifically excluded from the General Allotment Act are precluded from invoking rights extended by the Act or any amendment thereto. However, simply because the Quapaws were allotted under a separate act of Congress does not support a conclusion that the heirship provisions of the General Allotment Act cannot be applied to them.

6. Indian Probate: Generally—100.0—Indian Probate: State Law: Generally—390.0

Where no sec. of the General Allotment Act suggests that the Quapaws were to be excluded from the Act's provisions and where no section of the Quapaw Allotment Act suggests the inapplicability of the General Allotment Act to allotted Quapaw lands, there lies a reasonable basis for jointly interpreting these Acts. The correctness of applying the heirship provisions of the General Allotment Act to the Quapaws is conclusively established because the Quapaw Allotment Act fails to adopt state law.

7. Indian Probate: Appeal: Matters Considered on Appeal—130.4—Indian Probate: Evidence: Newly Discovered Evidence—225.4—Indian Probate: Rehearing: Generally—370.0

Newly discovered evidence is to be presented in support of a petition for a rehearing and will not be considered on an appeal.

8. Indian Probate: Children, Illegitimate: Generally—160.0—Indian Probate: Evidence: Presumptions—225.5

In a case of illegitimacy, it is a reasonable presumption that an unmarried father may refrain from widely proclaiming parenthood.

APPEARANCES: John G. Ghostbear, Attorney for Louis Wayne Ballard, appellant; James Vollintine and Michael J. Frank, Attorneys for Russell Lee Quapaw, appellee.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

INTERIOR BOARD OF INDIAN APPEALS

This case involves an appeal from a decision rendered after a rehearing. On Dec. 1, 1972, an Order Determining Heirs was entered in the estate of Louis Harvey Quapaw, deceased Quapaw unallotted, in which it was adjudged that Russell Lee (Hollandsworth) Quapaw, an illegitimate son, was the sole and only heir of the decedent. On Apr. 2, 1973, an Order Denying Petition for Rehearing was entered. Thereafter, this Board entered an Order Granting a Rehearing *De Novo*, dated May 22, 1973, on its own motion. The scope of the rehearing was limited by the Board's order to the single issue of Russell Lee Quapaw's paternity.

Administrative Law Judge John F. Curran held a second hearing in this case on January 30, 1975. On Feb. 27, 1975, Judge Curran entered an Order Determining Heirs on Rehearing in which Russell Lee Quapaw was again adjudged to be the son of the decedent and the only heir at law. Louis Wayne Ballard, a nephew of the decedent, through his attorney, filed a timely notice of appeal of the above order on Apr. 25, 1975. The appeal was docketed by the Board on June 5, 1975, and both parties to the appeal have furnished briefs for the Board's consideration.

The Board has decided that the Administrative Law Judge's Order Determining Heirs on Rehearing should be affirmed. The grounds for appeal set out by Louis Wayne Ballard are briefly discussed below as a means of reporting the Board's disposition of this case.

Jurisdiction

[1] As his first basis for appeal, the appellant claims that the Secretary of the Interior is without jurisdiction to decide the descent and distribution of an estate belonging to an unallotted Quapaw Indian who dies intestate. Although this question was not raised prior to the appeal,[1] the Board recognizes that jurisdiction is fundamental to its reviewing authority and this issue is therefore addressed.

[2] Appellant's reply brief argues at page 2 that the estate in question does not involve a "trust patent," in which legal title to land remains in the United States, but rather a restricted fee, in which the allottee or his heirs hold a legal fee with a restriction on alienation. The appellant does not question the authority of the Secretary to determine heirs of allotments held by

[1] 43 CFR 4.290 provides: * * * "The scope of the review on appeal shall be limited to those issues which were before the Administrative Law Judge when he ruled upon the petition for rehearing or reopening."

trust patents, but construes the provisions of the Act of June 25, 1910 (36 Stat. 855), 25 U.S.C. § 372 (1970), as precluding the Secretary from rendering heirship determinations when estates are held under a restricted fee. The Supreme Court ended this quarrel long ago in *United States* v. *Bowling*, 256 U.S. 484 (1921), an heirship case in which a tract of restricted fee land in Oklahoma was deemed covered by the terms of 25 U.S.C. § 372 (1970) as fully as trust allotments.

[3] Secondly, the appellant contends that 25 U.S.C. § 372 (1970) does not confer jurisdiction upon the Secretary to determine heirs beyond a proceeding involving the original allottee, in this case, Dick Quapaw, who died in 1918. The interpretation which courts and administrative bodies have implicitly given to the Act of June 25, 1910, *supra*, has consistently been that the Secretary of the Interior bears the responsibility of determining heirs to allotted land as long as the allotment is held in a trust or restricted status. See *Bertrand* v. *Doyle*, 36 F. 2d 351 (10th Cir. 1929), in which the court states that the Act of June 25, 1910, "clearly applies to both past and future allotments *and to all questions of heirship of the allottee arising within the trust period*." (Italics added.) See also, *Estate of Theodore Shockto (Deceased Unallotted Prairie Band Potawatomi Indian)*, 2 IBIA 224, 81 I.D. 177 (1974), and footnote 2, *infra*.

The Secretary's duty, therefore, extends beyond the determination of heirs of the original allottee to the determination of heirs of all Indians "who die intestate possessed of trust property" (43 CFR 4.202), except as otherwise provided by statute. The Board is not aware of any federal statute which divests the Secretary of the responsibility to determine heirs of Quapaw Indians who die intestate possessed of restricted property.

Appellant maintains that allotted Quapaw lands should be probated by the state courts of Oklahoma (Appeal Brief, p. 4). It is clear, however, that the object of the Act of June 25, 1910, is to grant to the Secretary of the Interior exclusive jurisdiction to determine heirship of deceased Indians, including deceased Quapaw Indians, who die possessed of trust or restricted property; the Secretary's exclusive power to determine heirs does not terminate until the trusteeship or period of restriction expires. *Larkin* v. *Paugh*, 276 U.S. 431 (1928); *Red Eagle* v. *Channing*, 294 P. 93, 146 Okl. 288 (1930);[2] *Arenas* v. *United States*, 95 F. Supp. 962 (S.D. Cal. 1951).

[2] In the *Red Eagle* case the Oklahoma Supreme Court specifically held that state courts have no jurisdiction to entertain a suit by an Indian heir of a deceased Quapaw Indian involving lands allotted pursuant to the Quapaw Allotment Act unless the trust period has expired. In the same manner, the Oklahoma courts have consistently recognized that the restrictions imposed by the Quapaw Allotment Act are not personal to the named allottee, but run with the land and operate on heirs of the allottee as well. *Ashton* v. *Noble*, 162 P. 784 (1917); *In re Long's Estate*, 249 P. 2d 103.

In a further attack on the jurisdiction of the Secretary in this case, the appellant claims that the period of restriction affecting the decedent's land expired prior to his death, thereby depriving the Secretary of authority to determine heirship.

[4] The Quapaw Indians were allotted under the Act of Mar. 2, 1895, 28 Stat. 876, 907. This Act contained a restriction against alienation of patents issued pursuant to the statute for a period of 25 years. The Act of Mar. 3, 1921, 41 Stat. 1248, *as amended*, Nov. 18, 1921, 42 Stat. 1570, extended the period of restriction for 25 years, or until Mar. 3, 1946. The Act of July 27, 1939, 53 Stat. 1127, extended the restrictions on Quapaw allotments "for a further period of 25 years from the date on which such restrictions, limitations and exemptions would otherwise expire." The date upon which restrictions "would otherwise expire" was Mar. 3, 1946. Thus, the most recent Act extended the restricted period to Mar. 3, 1971. Since the decedent in this case died on Sept. 29, 1970, his death preceded the expiration of the restricted period imposed on Quapaw allotments and only the Secretary of the Interior is authorized to render the determination of heirship.

Issue of Paternity

Appellant's other two grounds for appeal are 1) that the finding of the Administrative Law Judge that Russell Lee Quapaw was the natural son of Louis Harvey Quapaw, decedent, was not based upon a fair preponderance of the evidence or conclusive facts, and 2) that new evidence has been discovered which conclusively establishes that the decedent was not the father of Russell Lee Quapaw.

Before responding to these two claims, the Board will first address an overall objection raised by the appellant on appeal which goes to the authority of the Secretary to confer an inheritance right upon an illegitimate. The appellant submits that the provisions of 25 U.S.C. § 371 (1970), an amendment to the General Allotment Act, *supra*, which permits an illegitimate child to inherit from the father, are not applicable to Quapaw Indians because the Quapaws were not allotted under the General Allotment Act.[3]

By its order of May 22, 1973, granting a rehearing and limiting the issue thereon, the Board has already indicated its position that 25 U.S.C. § 371 (1970) applies in this case. In view of the statute, the above order states that the issue of legitimacy in the father's estate is moot.

Appellant refers to *Porter* v. *Wilson*, 239 U.S. 170 (1975), for the proposition that 25 U.S.C. § 371 (1970) only applies to Indians who are covered by the prior secs. of the

[3] Appellant characterizes this objection as jurisdictional. If the contention is valid, however, the Secretary must still determine decedent's lawful heirs. Accordingly, this allegation is treated in this opinion as potentially a limited error of law in the Administrative Law Judge's decision rather than as a complete jurisdictional defect.

General Allotment Act. Specifically, the Court's holding in *Porter*, *supra*, an heirship case involving Creek Indians, rests on the fact that by sec. 8 of the Act of Feb. 8, 1887 (25 U.S.C. § 339 (1970)), "the territory occupied by the * * * Creeks * * * in the Indian territory" was expressly excepted from the provisions of the General Allotment Act. At 174.

[5] The Board agrees that Indians specifically excluded from the General Allotment Act are precluded from invoking rights extended by the Act or any amendment thereto. However, simply because the Quapaws were allotted under a separate Act of Congress does not support a conclusion that the heirship provisions of the General Allotment Act cannot be applied to them.

[6] Moreover, where no section of the General Allotment Act suggests that the Quapaws were to be excluded from the Act's provisions and where no section of the Quapaw Allotment Act suggests the inapplicability of the General Allotment Act to allotted Quapaw lands, there lies a reasonable basis for jointly interpreting these Acts. In the problem at hand, determining what laws to follow in determining heirship for the allotted land of a deceased Quapaw Indian, the correctness of applying the heirship provisions of the General Allotment Act to the Quapaws is conclusively established because the Quapaw Allotment Act fails to adopt state law. Since state law cannot be made applicable to allotted Indian land except to the extent so authorized by Congress,[4] and since tribal powers do not extend to determining heirs of trust or restricted property,[5] the decedent's estate must be probated in accordance with federal requirements, including the requirement that illegitimate children may inherit interests in an allotment. This result is consistent with the premise that statutes legitimatizing children should be liberally construed. *Estate of Harry Colby*, 69 I.D. 113, 116 (June 29, 1962).

EVIDENCE OF PATERNITY

It appears to be undisputed by the parties that Russell Lee Quapaw's mother was Opal Hollandsworth, now deceased, and that Opal was not married to the decedent, Louis Harvey Quapaw, at any time. The factual controversy throughout the proceedings in this case has been whether Opal Hollandsworth conceived Russell Lee (Hollandsworth) Quapaw through intercourse with the decedent, Louis Harvey Quapaw, or through Tom Panther, who was tried in the District Court for Ottawa County, Oklahoma, for the alleged rape of Opal Hollandsworth.

Irrespective of whether Tom Panther was in fact guilty of the rape charge, the Administrative Law Judge concluded that it would not have been possible for the alleged rape to have resulted in the

[4] *Chemah* v. *Fodder*, 259 F. Supp. 910 (D.C. Okl. 1966).
[5] 25 CFR 11.31.

birth of Russell Lee Quapaw. The evidence substantiated that Russell Lee Quapaw was born Sept. 13, 1923.[6] The alleged rape occurred April 15, 1923. Since the average gestation period is medically considered to be 10 lunar months (280 days) from the last menstrual period and 266–270 days from conception,[7] Judge Curran notes that "the conception must have occurred long prior to Apr. 15, 1923, to result in the birth on Sept. 13, 1923." (Decision on Rehearing, p. 2.) In addition, the appellee's analysis of the state court documents examined from the Tom Panther case correctly points out that the defendant, at the most, was convicted of "assault with intent to commit rape," rendering the claim of the appellant in this proceeding all the more untenable.[8]

There is sufficient affirmative evidence in the record that Russell Lee Quapaw is the natural son of the decedent that it could still outweigh proof of a rape of the appellee's mother by Tom Panther at a time which might have resulted in the birth of a child in Sept. 1923. Ida Reynolds, twin sister of Opal Hollandsworth and appellee's aunt, stated that the decedent acknowledged that Russell Lee was his son, that the decedent and Russell Lee were similar in appearance and that the decedent was known in the community to be the father of Russell Lee Quapaw. Ruth Hampton, sister-in-law of appellee's mother, testified to the same effect on deposition. In addition, the original record in this case contains a copy of an application for the admission of Russell Lee Quapaw into the Seneca Indian School when the appellee was 7 years old. This document shows Russell Lee's father to be the decedent. Appellee's delayed birth certificate, dated Nov. 21, 1972, shows the decedent was his father and the appellee states that all his life he has regarded the decedent as his father.

Newly Discovered Evidence

The appellant claims that there is newly discovered evidence which establishes that Russell Lee Quapaw is not the son of the decedent. Generally, the evidence referred to is limited to the issue of community reputation.

[7] It is noted that the appellant received timely notice of the rehearing in this case. Accordingly, the witnesses who have been discovered should have been produced by the appellant at the Jan. 30, 1975, hearing. Newly discovered evidence is to be presented in support of a petition for a rehearing and will not be considered on an appeal. 43 CFR 4.241; *Estate of Shows in a Crowd*, A–24813 (February 25, 1948).

[6] Although the appellant questions the validity of this conclusion, appellee's date of birth is corroborated by the statement of his aunt, Ida Reynolds, who was present when he was born, and the delayed birth certificate of Russell Lee Quapaw.

[7] See *Whitney* v. *Whitney*, 337 P.2d 219 (1959); *Dazey* v. *Dazey*, 122 P.2d 308 (1942).

[8] See appellee's discussion of the Panther records, p. 9, Answer to Appeal of Louis Wayne Ballard.

[8] If the Board were authorized to consider the latest evidence of the appellant, there would still be no basis for doubting the correctness of the Administrative Law Judge's findings. The record already contains conflicting evidence on community reputation and it comes as no surprise to the Board that the appellant can produce more names of persons who have no knowledge that the decedent fathered an illegitimate child. In a case of illegitimacy, it is a reasonable presumption that an unmarried father may refrain from widely proclaiming parenthood.

Conclusion

On the basis of the foregoing conclusions and factual review of the record, the Board is satisfied that Russell Lee Quapaw is the son of the decedent and legally entitled to the privileges of a sole heir.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Order Determining Heirs on Rehearing, dated February 27, 1975, be, and the same is hereby, AFFIRMED.

This decision is final for the Department.

MITCHELL J. SABAGH,
Administrative Judge.

I CONCUR:

WILLIAM PHILIP HORTON,
Alternate Member.

APPEAL OF IVERSEN CONSTRUCTION COMPANY (A/K/A ICONCO)

IBCA-981-1-73

Decided *December 30, 1975*

Contract No. 14-06-D-7193, Specifications No. DC-6898, Upgrading Section of Malin-Round Mountain, 500-kilovolt Transmission Line No. 1, Bureau of Reclamation.

Denied.

1. Contracts: Construction and Operation: Changes and Extras—Contracts: Disputes and Remedies: Burden of Proof—Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Evidence—Rules of Practice: Witnesses

A claim for acceleration under a contract for the construction of footings for a transmission line is denied where one of appellant's principal contentions was that in a telephone conversation following record snow in late Sept. the project engineer had directed that men and equipment be added to the job in order to finish the work by the contract completion date of Nov. 1, but in correspondence conducted with the Government for almost 6 months after such telephone conversation the contractor failed to refer to the directions purportedly received from the project engineer and even failed to reference the particular telephone conversation. Actions taken by the Government's principal inspector were also found not to constitute acceleration orders when the evidence clearly showed that both parties viewed the inspector's action as involving suggestions rather than directions and that whether the suggestions were accepted by the contractor's job superintendent depended upon the exercise of his business judgment.

APPEARANCES: Mr. Wade H. Hover, Attorney at Law, San Jose, California, for appellant; Mr. William A. Perry, Department Counsel, Denver, Colorado, for the Government.

OPINION BY ADMINISTRATIVE JUDGE NISSEN
INTERIOR BOARD OF CONTRACT APPEALS

This appeal involves a claim for constructive acceleration.[1] In accordance with the stipulation of the parties only the issue of liability is before us.

Findings of Fact

The contract, awarded on Aug. 23, 1971, is in the estimated amount of $258,700, and called for upgrading a section of Malin-Round Mountain 500-kilovolt Transmission Line No. 1, Malin-Round Mountain Section, in accordance with Specifications No. DC–6898. The contract included Standard Form 23–A, Oct. 1969 Edition.

Paragraph 15 of the specifications as amended by Supplemental Notices, Nos. 1 and 3 required the work to be completed by Nov. 1, 1971. Liquidated damages of $75 per calendar day for delay in completion of the work were provided in Paragraph 16 of the specifications.

Bids for upgrading a section of Malin-Round Mountain 500-kilovolt Transmission Line No. 1 were originally opened on July 22, 1971. Work called for included erection of additional steel towers, modifying and relocating existing steel towers, removing towers, certain conductor and ground wire installations as well as other work. The work was divided into three parts: (1) all work to complete the tower footings; (2) all work to complete the upgraded section of the line to the extent required to permit permanent energization;[2] and (3) remainder of the work. All work was to be completed by Dec. 1, 1972.

By Supplemental Notice No. 3, dated July 30, 1971, bidders were advised that all bids were rejected because of excessive prices.[3] New bids under the same specifications, limited to work necessary for constructing reinforced concrete tower footings (Items 1 through 12 of the

[1] The notice of appeal, which was treated as the complaint required by the Board's rules, contains an additional claim in the amount of $8,476 for placing concrete allegedly in excess of contract requirements. Since no evidence in relation thereto was offered at the hearing and no mention of this claim is made in appellant's posthearing briefs, we consider that the claim has been abandoned.

[2] Part 2 of the work was to be completed within 30 days of the date established by the Government for starting the outage (stated in Paragraph 40 of the specifications to be between September 1 and 30, 1972). Liquidated damages for delay in completion of this portion of the work were established as $2,500 per calendar day. A memorandum from the Regional Director, Sacramento to the Director of Design & Construction, Denver, dated July 2, 1971 (App.'s Exh. 18), places the Bureau's loss of revenue during the outage period at $5,000 per day.

[3] The real reason for the rejection appears to be that the low bid exceeded funds available for the work (Teletype from Regional Director, Sacramento, to Director Design and Construction, Denver, dated July 29, 1971, App.'s Exh. 15).

Bidding Schedule), were solicited for opening on August 6, 1971.[4] Bidders were advised that the other work would be advertised at a later date.

The Malin-Round Mountain Section of the 500-kilovolt Transmission Line No. 1 is located in northern California near the Oregon border (Location Map). Upgrading of the line was considered necessary because a number of steel towers had collapsed in December of 1970 due to excessive icing (Tr. 235, 307; Pacific Gas & Electric Company memo, dated Oct. 3, 1972, appeal file, Exh. 21). A parallel line operated by Pacific Gas & Electric Company was also out of service at that time for the same reason. Service on the Bureau line was not restored until Jan. 30, 1971.

Initial Performance

Appellant commenced work on August 18, 1971, which was prior to award.[5] The notice to proceed was issued on Aug. 27, 1971 (App's. Exh. 2), and was apparently received by appellant on Aug. 30, 1971 (memo dated Aug. 31, 1971, appeal file, Exh. 2). Under the contract terms, the completion date of Nov. 1, 1971, was not dependent on receipt of notice to proceed. Mr. Ronald Allison, Vice President of Iversen, testified that appellant mobilized and moved onto the job site prior to award because they were concerned that weather conditions might preclude completion of the contract (Tr. 29).

A construction schedule enclosed with appellant's letter to the Bureau, dated Sept. 15, 1971 (Gov't's Exh. B), indicates that appellant planned to complete rough excavation by the week ending Sept. 18, to complete rock excavation and fine grading early the following week, to complete forming, stripping and steel work and concrete pours prior to Oct. 9, to complete backfilling operations prior to Oct. 16 and to be moved off of the job site not later than Nov. 1, 1971. Mr. Allison testified that appellant was ahead of schedule as of Sept. 22, 1971, the date of the first estimate for purposes of progress payments (Tr. 37). This estimate, Contract Summary (Construction) and Voucher, for the period Aug. 30 through Sept. 22, 1971 (App's Exh. 5), indicates that 40.3 percent of the work had been completed and that 38.1 percent of the performance time had elapsed. Mr. Jack Iversen, appellant's construction superintendent, conceded that there had been minor delays on some phases of the

[4] A teletype from the Regional Director (note 3, *supra*) discussing options available to the Bureau contains the following: "Rejection with immediate readvertisement for foundations considered but time for completion insufficient. Rejection with readvertisement next year considered but use of existing section of line through coming winter without foundations for new towers too risky. Other options available but economic advantages questionable."

[5] Although appellant's Vice President, Mr. Allison, fixed the date mobilization started as August 17 (Tr. 77), Mr. Jack Iversen, appellant's construction superintendent, testified that the contractor started moving onto the job site on August 18, 1971, in order to expedite the work (Tr. 119). A summary compiled from payroll records submitted to the Bureau shows a total of 92 man-hours for the week ending Aug. 20, 1971 (Gov't's Exh. F).

work, but asserted the contractor was ahead of the projected schedule on other phases of the work by Sept. 22 (Tr. 121).

Although not necessarily utilizing full crews, appellant's practice was to perform some work on Saturdays. Mr. Iversen testified that it was snowing when they arrived on the job on Saturday, Sept. 25, 1971, that it continued snowing and that the crews were sent home on that date (Tr. 123). An explanatory note to a photograph taken on that date refers to heavy rain, sleet and high winds, states that work was suspended for safety reasons, that work accomplished was almost nil, and that supervisory personnel were on the job site until 5 p.m.[6] Although roads from the base camp to the job site were considered to be impassable on Monday, Sept. 27, crews were brought in from what Mr. Iversen referred to as the "north side" and preparations for concrete pours were made.[7] Pours for footings for two legs of a tower and another partial pour were accomplished on Tuesday, Sept. 28.

Mr. Iversen testified that a storm struck the area on the evening of Sept. 28, continued through the 29th and 30th, that the weather turned cold and that by the 30th there was up to 18 inches of snow on the mountain (Tr. 124). He stated that crews started up the mountain on the 29th, but were sent home and the job shut down. This testimony is supported by photos and the notes thereto (note 6, *supra*) which show a trace of snow on the ground and concrete pouring operations in progress on Sept. 28, additional snow on Sept. 29 (the note stating that all personnel were off of the mountain by 11 a.m.), and deep snow on Sept. 30. The note to the photos of Sept. 30 states that snow from Burney, located approximately 13 miles away, to the job site was approximately 11 inches deep and refers to snow up to 18 inches deep at Tower 7½, which location was reached on foot.

Performance Subsequent to Oct. 4

Temperatures rose rapidly after Oct. 1, 1971,[8] an appellant resumed work on Oct. 4 (Tr. 45, 126).

No precipitation fell on the job site during the period Oct. 1 to Oct. 14, 1971, inclusive (Lester and

[6] Photo Album, App.'s Exh. 12. Mr. Iversen took some of the pictures in the album and testified that the remainder were an accurate depiction of conditions at the site (Tr. 159, 160). Notes to the photos, labeled "Supervisors Report," were written by Mr. Iversen and Ken Olson, foreman in charge of equipment and tower excavation (Tr. 158). The original "Supervisors Report" is not in evidence.

[7] Tr. 123. Supervisory personnel moved equipment necessary for concrete pours from the base camp to the work site on Sunday, Sept. 26, 1971 (photo of even date, App.'s Exh. 12). The note states that heavy snows were encountered and that it was necessary to tow all vehicles with a D–5 tractor.

[8] P. 4, Investigation of Weather Conditions, dated June 2, 1972, by Dr. Peter F. Lester, Consulting Meteorologist, hereinafter Lester Report, appeal file, Exh. 19 and p. 2, Weather Summary dated July 26, 1972, by Clarence E. Everson, Chief Meteorologist for the Bureau, hereinafter Everson Report, appeal file, Exh. 20.

Everson Reports, note 8, *supra*). The Everson Report states that it is very probable 2 to 4 inches of snow fell over much of the transmission line region on Oct. 15 and 16. This assumption is supported by photos taken on Oct. 15 and the note thereto (App.'s Exh. 12) and was confirmed by Mr. Iversen (Tr. 134). The photos for Oct. 15 show snow on the ground and the note states that light snow started at 9 a.m., that backfilling operations were halted by an inspector at 10 a.m. in order to avoid placing snow in the fill, that work was suspended at other sites for safety reasons, and that snow accumulated to 4 inches at Towers 70/2 and 70/7. Dr. Lester's Report indicates that the Oct. 16 snowfall left 4 to 7 inches of snow on the ground at higher elevations.[9]

The following findings concerning weather conditions and progress at the job site are based on photos and the notes thereto (App.'s Exh. 12), except where otherwise indicated.[10]

Temperatures at the job site on Saturday, Oct. 16, 1971, were below freezing and there was drifting snow. A temperature of 28 degrees was reported at Tower 70/8 at 10 a.m. Apparently, no work was attempted on that day.

Work resumed on all phases of the project on Monday, Oct. 18, 1971. Roads were frozen and in good condition in the morning and slick from thawing in the afternoon. Work proceeded on Tuesday, Oct. 19, with the principal obstacle being mud from thawing snow. A few, fine snow flurries occurred in the morning of Wednesday, Oct. 20. However, appellant gained easy access to all pour sites, cat towing of concrete mixer trucks was unnecessary and roads were improving.

Mr. William C. Hart, Project Construction Engineer, and authorized representative of the contracting office, visited the site on that date to attend a safety meeting.[11] His diary (App.'s Exh. 14) for October 20 states that fog and rain were encountered, that the job site was a horrible, muddy mess, but that the contractor was placing CBF (compacted backfill) and concrete. According to the diary, appellant had footings for seven more towers to place after October 20.

Pouring of footings for Tower 72/3 was curtailed on Oct. 21 because of the inability of the concrete subcontractor to make sufficient

[9] "Higher elevations" in this context refers to Manzanita Lake, elevation 5,850, and Jess Valley, elevation 5,400, located approximately 34 and 67 miles, respectively, from the job site. Dr. Lester judged conditions at these stations to most be representative of the job site based on the period of availability of weather data, elevation, rise (difference between elevation of the station and the highest point within a 5-mile radius), exposure to storms from the Pacific and other factors. The period of availability of data used by Dr. Lester was 23 years at Manzanita Lake and 24 years at Jess Valley, including 1971 (Tr. 167).

[10] Although daily reports were prepared by Bureau inspectors concerning the contractor's activities, progress of the work, weather conditions, etc. (Tr. 373–74), these reports are not in the record.

[11] A memorandum summarizing that meeting (Govt.'s Exh. D) states that Mr. Iversen expressed the opinion that the most hazardous operation would be driving on rain-soaked, mud-covered roads.

deliveries. The subcontractor's difficulties were apparently due to the condition of the roads. Friday, Oct. 22, was clear and mild, although bad weather was reported to be approaching. Pouring of footings for Towers 72/3 and 72/1 was completed and preparations made for pours at Tower 71/4. Pours at the latter tower were canceled over the objection of the Bureau inspector because the pours could not be completed in remaining daylight.[12] A snowstorm struck the area on Saturday, Oct. 23, resulting in the cancellation of all work despite objections by the Bureau inspector. Snow had accumulated to approximately 6 inches at the base camp by 2 p.m.

Monday, Oct. 25, was clear and mild. Roads were muddy and slick. Nevertheless, concrete pours were accomplished at Towers 71/4 and 71/7, the former with cat assistance. Tuesday, Oct. 26, was mild and pleasant, although site access roads were very muddy and rutted. One mixer truck broke an axle necessitating unloading of its concrete and a second truck blew an engine. A concrete pour was completed after dark without serious difficulty.

Intermittent light snow fell on Wesdnesday, Oct. 27, and the temperature began dropping. Cat assistance was necesary in order to move mixer trucks from pour sites. Temperature was a minimum of 16 degrees on the morning of Oct. 28 and no concrete pours were scheduled. Appelant was informed that water for the next pour would have to be heated. Appellant ordered salamanders (heaters). The temperature continued cold on Friday, Oct. 29, and difficulty was experienced in bringing water to the desired temperature. This was finally accomplished with the aid of a weed burner. The batch plant experienced difficulty in maintaining water temperature and 2 yards of concrete were wasted. Concrete placement, number not stated, was completed by dark.

The morning of Saturday, Oct. 30, was clear and cold. However, snow showers commenced and turned into continuous snow. Blizzard conditions and near zero visibility prevailed at times. Placement sites were tented and some pours were accomplished. Tractor assistance for mixer trucks was required. Placement at one site was discontinued for safety reasons.

The temperature on Sunday, Oct. 31, was well above freezing, resulting in rapid melting of snow. Preparation for the final pours were made. Monday, Nov. 1, was also clear and pleasant. Although tractor assistance was necessary to move trucks from the site, the final pour was accomplished under lights approximately one-half hour after dark.

During the period Oct. 19, 1971, through the final placement of con-

[12] Mr. John Chiolero, chief inspector for the Bureau, admitted to being upset that the pours scheduled for Oct. 22 were canceled because Bureau inspectors had exceeded their normal duties in assisting appellant to prepare for the pours (Tr. 383–84).

crete on Nov. 1, it was necessary for appellant to protect fresh concrete from freezing by use of insulation or tenting and heating.

The Bureau accepted the project as substantially complete as of Nov. 1, 1971 (Tr. 129–30, 352; letter dated Nov. 10, 1971, appeal file, Exh. 6). Mr. Iversen testified that this was in accordance with an agreement with Mr. Chiolero, chief inspector for the Bureau, that the work would be accepted as substantially complete if the last pour was made on or before Nov. 1 (Tr. 129). All work was completed on Nov. 7 (Tr. 381, 403) and final inspection and acceptance took place on Nov. 8, 1971 (Tr. 130).

Unusual Severity of the Weather

Dr. Lester and Mr. Everson each concluded that any snowfall for the job site area in Sept. is highly unusual and not to be expected (Reports, note 8, *supra*). Dr. Lester's ultimate conclusion was that weather conditions during the period Sept. 27 through Sept. 30, 1971, inclusive, were unusually severe and could not have been anticipated from available climatological data (Tr. 167). His report states that this period could possibly be extended for 3 additional days to cover the period of melting snow. Although referring to a storm event in northern California during the period Sept. 25 through Sept. 30, 1971, it is clear that Dr. Lester's conclusion the weather was unusually severe is based entirely upon snowfall (Tr. 172). His report states: "Heavy snow (greater than 4" in 24 hours) fell at the higher elevations (note 9, *supra*) on 30 September * * *" and that "The 30 September event occurred at the end of a 4-day storm and resulted in 4" to 8" accumulations of snow on the ground. * * * Snow fell at the higher elevations while rain fell at lower levels."

Sept. is considered one of the dry season months in California and normally approximately 1 inch of rain can be expected in the vicinity of the Malin-Round Mountain Transmission Line (Everson Report). Precipitation during Sept. 1971 was concentrated in the 5-day period at the end of the month. Data from Burney, located approximately 13 miles from the site, reflects .29 of an inch on Sept. 26, .05 of an inch on Sept. 27, 0 on Sept. 28, .06 of an inch on Sept. 29, and 1.28 inches on Sept. 30 for a total for the month of 1.68 inches. This is to be compared with an average of .68 of an inch over a 26-year period.[13]

The Board finds that weather conditions at the job site during the 4-day period Sept. 27 through Sept. 30, 1971, inclusive, were unusually severe and unforeseeable within the meaning of Paragraph (d) of Clause 5, Termination For Default Damages For Delay-Time Extensions, of the General Provisions. Mr. Allison testified that construc-

[13] Everson Report, note 8, *supra*. Burney is at elevation 3,127. Although Mr. Allison testified that the work was performed at elevations of 3,600 to 3,700 feet (Tr. 38), we find that elevations at the job site (Towers 68/3 to 73/1) were approximately 5,000 feet (Tr. 169; Everson Report; Figure 1 of Lester Report; Location Map).

tion was stopped during the period Sept. 27 to Oct. 4, 1971 (Tr. 47). Mr. Iversen asserted that appellant lost Saturday, Sept. 25, a portion of Sept. 27 through Sept. 30, lost Oct. 1 and 2 and worked partial days on Oct. 4 and 5.[14] The record would not support a finding that weather on Saturday, Sept. 25, was unusually severe and it is clear that, except for Sept. 25, work was not shut down due to weather until Sept. 29. We fix an appropriate extension at 6 calendar days, which includes Wednesday, Sept. 29, through Sunday, Oct. 3, and allows 1 work day for delays attributable to melting snow on Oct. 4 and 5. Appellant's request for an extension of unspecified length is discussed *infra*.

Dr. Lester also concluded that weather conditions during the period Oct. 16 through Oct. 31, 1971, were unusually severe (Tr. 167; Report, note 8, *supra*). His report and that of Mr. Everson are in agreement that a series of five fronts or storms traversed the northern California area during the period from Oct. 15 through Oct. 31, 1971. Dr. Lester determined that the total snowfall for Oct. 1971 fell in this period and that the amount was highly unlikely (Tr. 179, 187–88). However, specific snowfalls referred to are 4 to 7 inches on Oct. 16 and an accumulation of 2 to 4 inches on Oct. 30. He also concluded that temperatures during the period Oct. 27 through 31, 1971, were unseasonably low and therefore unlikely.

Mr. Everson determined that normally some snowfall is to be expected at the 5,000-foot levels in Oct. in this area and that significant amounts were not unusual. The latter conclusion was based on Oct. snowfalls exceeding 10 inches (16 inches in Oct. 1956) at Mazatlan Lake[15] during 3 of the 10 years in the period 1951–60. He therefore concluded that the total of 12 inches of snow in Oct. of 1971 was not an unusual occurrence and was within the realm of planning expectancy.

Dr. Lester did not agree with Mr. Everson's conclusions (Tr. 190–91, 193). He testified that it was characteristic of extreme [weather] events to occur in bursts and that picking the period where the extreme events occurred, notwithstanding that data was available for a longer period, biased the statistics resulting in a higher than warranted determination of the probability of the occurrence or recurrence of such events. His own determination was that the probability of snowfall exceeding 10 inches in Oct. was 6 percent at Manzanita

[14] Tr. 150. He further testified: "* * * We resumed work partially on the 4th with probably a third of a crew. We lost a good portion of that. As a matter of fact, I don't think we poured again until the 6th." (Tr. 150.) This testimony is supported by photos and the notes thereto (App.'s Exh. 12). He estimated that weather conditions during the period of contract performance resulted in delays to the job totaling 8 days (Tr. 157).

[15] Mazatlan Lake is not identified in the precipitation and temperature data included with the Everson Report. Accordingly, it is probable that the reference was intended to be Manzanita Lake.

Lake and 4 percent at Jess Valley.[16] This is to be compared with the Oct. 1971 snowfall at these locations of 11 and 13 inches, respectively. Mr. Everson did not appear as a witness at the hearing and his choosing the period 1951–60 for his determination when the year under consideration is 1971 has not been explained. We conclude that amounts of snowfall on Oct. 15–16 and Oct. 30 were unusual and not to be expected.

Minimum temperatures at Jess Valley and Manzanita Lake in Oct. 1971 set all-time records (Tr. 181; Lester Report, Table 4). Dr. Lester and Mr. Everson are essentially in agreement that minimum temperatures experienced at the end of Oct. were rare and unusual. The Board finds that weather conditions during the period Oct. 15–17 and October 27–31, 1971, were unforeseeable and unusually severe within the meaning of Paragraph (d) of Clause 5 of the General Provisions.

The record reveals that the job was shut down on Oct. 15 because of snow and that work did not resume until the 18th. Concrete pours were not attempted on Oct. 28 because of the cold and although slowed by the necessity of heating water, etc., work proceeded on all other days during the period Oct. 27–31, 1971. Assuming, arguendo, that appellant made a timely request therefor (Mr. Hart testified that he considered the letter of Oct. 4, 1971, a request for a time extension for the entire job, Tr. 358), we find appellant entitled to an additional extension of 4 calendar days during the period Oct. 15–31, inclusive.

[16] Tr. 179; Report, Table 2. Since data for a 100-year period were not available, these determinations were based on extrapolating from available data (Tr. 180). Dr. Lester testified that this was commonly done in hydrometeorological work. His conclusion from available data was that the probability of snowfall exceeding 10 inches was less than 14 percent (Tr. 193).

Oct. 1 Telephone Conversation and the Claim

Project Engineer Hart's office was located in Willows, California. On the morning of Friday, Oct. 1, 1971, he placed a telephone call to appellant and spoke to Mr. Allison.[17] At this time, he (Hart) was aware that the job had been shut down due to snow on Sept. 29 and that there was 12 to 18 inches of snow at the site on Sept. 30 (Tr. 286; Perpetual Date Book, App.'s Exh. 14; Telephone Diary, Joint Exh. AA). The evidence is in conflict as to precisely what was said during this conversation. Mr. Allison[18] testified that Mr. Hart inquired as to when appellant was going to resume work and

[17] Tr. 41, 236, 250, 262–63. Although Mr. Hart maintained a daily diary (Perpetual Date Book, App.'s Exh. 14) and a telephone diary (Joint Exh. AA) neither diary refers to this conversation. Mr. Hart expressed doubt as to having initiated the call, but was convinced that he had done so by reference to Bureau records (apparently telephone bills), which are not in evidence (Tr. 248, 262–63, 272). The Oct. 1971 telephone bill for Iversen Construction Company (App.'s Exh. 13), which was introduced for the purpose of showing that no telephone call was initiated by appellant to the Bureau office on that date (Tr. 248), nevertheless, reflects an Oct. 1 telephone call to Mr. Hart's Willows office number.

[18] At the time of the instant contract Mr. Allison had been employed by appellant for 6 or 7 years. During this period, the firm had received contracts from the Bureau of Land Management, Navy and Corps of Engineers (Tr. 75, 76).

that he (Allison) responded that he could not tell because the weather had not let up and that he feared winter had set in and that it would be necessary to leave the job (Tr. 41–43). Allison further testified that he asked about the possibility of an extension of time and that the reply was: "And he told me that we could not give an extension of time until it was proven that the weather was unusual and severe, and until that was proven, we had to complete the contract by the completion date of November 1, and, to do that, it was necessary to get more men and equipment up there to get it done" (Tr. 41–42).

Mr. Allison was positive that he was told by Mr. Hart "that in order to get completed by Nov. 1, it was necessary to add more men and equipment on the project site" (Tr. 43). He stated that Mr. Hart responded to his request for an extension of time as follows: "That we [the Bureau] could not grant an extension of time until the weather records were compared to previous years to ensure (sic) that the weather was, in fact, unusual and severe." Although he testified that he had checked weather records at the San Jose State College Library prior to the conversation with Hart and that he was of the opinion that weather encountered by appellant was unusually severe, he acknowledged that no information from such records was furnished to Mr. Hart at the time or in his letter of Oct. 4, 1971 (quoted infra), requesting a time extension (Tr. 44, 89–90). Allison asserted that after the telecon with Hart, he contacted his superintendent, Mr. Iversen, and told him to add more men and equipment to get the job done.[19] He stated that approximately 10 more men were employed by appellant after Oct. 4, 1971. (Tr. 46, 90.) Although he maintained that additional equipment was employed after that date or that equipment on hand was used for additional time, he did not identify such equipment.

Mr. Hart confirmed discussing the possibility of an extension of time due to unusually severe weather with Mr. Allison during the Oct. 1 telephone conversation (Tr. 287–88, 296). He advised Allison to write a letter giving notice of delay so that it could be considered (Tr. 283, 287–88). He also confirmed that the possibility of shutting down the job for the winter was discussed.[20] He told Allison that

[19] Tr. 45. Although not specifically stated, it is at least implied that the contact with Mr. Iversen was immediately or shortly after the telephone conversation with Hart. Mr. Jack Iversen testified that because of site conditions he couldn't justify putting a full crew on the job on Oct. 4 and 5 and, in fact, was in no hurry to do so because appellant was seeking a cessation of the work (Tr. 130, 131).

[20] Tr. 290, 298. In an October 1 telecon with Mr. Ed Lewandowski, an engineer on the staff of the Regional Director in Sacramento, which apparently followed the telecon with Mr. Allison, Hart recommended backfilling footings with loose material in the event of a winter shutdown (Tr. 273–75; Telephone Dairy, Joint Exh. AA). Although there is an inference to the contrary in the record (Tr. 273), the diary indicates that this call was initiated by Mr. Lewandowski concerning other matters and that the subject of Specifications DC–6898 was raised when Mr. Lewandowski inquired about progress.

shutting down the job would be his (Allison's) decision (Tr. 290). Although he admitted discussing the matter of additional men and equipment, his recollection was that this came in response to Allison's question as to how the work could be speeded up and that his (Hart's) reply was: "Well, if you are behind and you want to get done, the only thing I know is either put on more men and equipment or work more hours with those you have." [21] He stated that he did not know whether this illustrated naivete on Allison's part and flatly denied ever directing the contractor to add men and equipment to the job in order to complete the work by November 1 (Tr. 313, 333).

Under date of Oct. 4, 1971, Mr. Allison addressed a letter to the project engineer (appeal file, Exh. 3) providing as follows:

> In accordance with Paragraph 5 of the General Provisions, this is to advise you that as of September 27, 1971 we have been delayed in the completion of our work from unforeseeable causes beyond the control and without the fault or negligence of the contractor.
>
> On the 27th our work force was stopped by heavy rain that turned to snow. The snow level the next day, the 28th was in excess of one and a half feet on the job site.
>
> This unusual and severe weather has stopped the progress of work.
>
> Our fear is that this delay may put us into winter, if we aren't there already.

Although the letter was allegedly written to confirm [22] matters discussed in the Oct. 1 telephone conversation with the project engineer, the letter does not refer to the telephone conversation. It is also clear that the letter contains inaccuracies since, except for Sept. 25, work was not stopped until the 29th and snow did not reach the depths indicated until Sept. 30. The project engineer replied to the letter on Oct. 8, 1971, as follows:

> Your letter of Oct. 4, 1971, advising this office of delays in completion of the work due to heavy rain and snow has been placed on file for consideration as to justification and extent at a time when

[21] Tr. 290; also Tr. 300, 313. On examination by appellant's counsel, Mr. Hart also testified as follows:

"Q. Isn't it true, sir, that having those facts [revenue loss to the Government and desirability of having footings in places prior to the onset of winter, notes 2 and 4, *supra*] in mind you instructed Mr. Allison to put on the necessary men and equipment to get the job done by the 1st of Nov.

"A. That is not true. That was Mr. Allison's decision. Mr. Allison asked me how he could speed it up. I gave him a suggestion and he chose to do it that way." (Tr. 313.)

[22] The appellant's Corporate Secretary, Mr. John E. Weber, testified that he was in the office with Mr. Allison on Oct. 1, 1971, and heard his end of the telephone conversation with Mr. Hart. Afterwards Mr. Allison related the substance of the telephone conversation to Mr. Weber and they collaborated in the preparation of the time extension request of October 4, 1971 (Tr. 237–238). Mr. Weber stated that "And so that was the other reason for sending the letter, to verify the conversation" (Tr. 239). Upon direct examination Mr. Weber testified as follows: "Q. What were the considerations in your mind at the time you prepared that letter? A. Well, number one, Mr. Hart had directed us to add men and equipment, if necessary, to get the job done by November 1st. Secondly, he was not granting an extension of time until after the job was done, if there was going to be one, based upon an extension of time for excusable delay because of weather" (Tr. 238).

Neither appellant's letters of Oct. 18 and 29, 1971 (Gov't. Exh. A; appeal file, Exh. 5), nor its letter of November 30, 1971 (appeal file, Exh. 7), refers to the orders allegedly received from Mr. Hart to add men and equipment to the job in order to meet the specified completion date of Nov. 1, 1971.

it may become apparent that a time extension is required. Clause 5(d) of the General Provisions stipulates the contractor will not be charged with damage if delay in completion of the work is due to unusually severe weather. However, determination of unusually severe weather is made by comparison with long-term weather records.

In a letter to the project engineer, dated Oct. 29, 1971 (appeal file, Exh. 5), appellant referred to its letter of Oct. 4, 1971, and stated that other than a short period when deep snow made all operations impossible, it had continued to work through difficult and trying conditions in order to meet the completion date of Nov. 1, 1971. Conditions referred to were described as intermittent and persistent snow, rain, hail, sleet, fog, high winds, and freezing temperatures. The letter asserted that, even with full crews and equipment, operations were often brought to a near standstill, causing considerable additional expense and lost time. It was further alleged that National Weather Service records, not enclosed, had been obtained for the past 10 years which substantiate that appellant had suffered through unusual, extreme and severe conditions which materially altered the nature of the work over that ordinarily expected. The letter closed with the following: "We shall continue to document all information which might be of assistance to you in the determination of an equitable adjustment to this contract."

Although the foregoing letter was signed by Mr. Allison, Mr. John E. Weber, appellant's Corporate Secretary, participated in its preparation (Tr. 241). He testified that the letter was written within 20 days of the receipt of Mr. Hart's letter of Oct. 8 and was intended to comply with the 20-day notice provision of the contract (Tr. 242, 252). However, he admitted that he did not know under what clause the claim was asserted.

By letter, dated Nov. 30, 1971 (appeal file, Exh. 7), the project engineer was advised that appellant was in the process of compiling facts and figures to verify additional costs incurred to complete the project by Nov. 1, 1971. Costs referred to were allegedly caused by severe and unusual weather which materially altered existing site conditions. The letter stated that the contract was essentially completed by the deadline in spite of the weather conditions and asserted that completion for the convenience of the Government caused substantial expense to appellant. The project engineer was advised that a claim for an equitable adjustment would be forwarded as soon as it was completed.

The claim in the amount of $80,304.95 was submitted under date of Dec. 29, 1971 (appeal file, Exh. 10). The letter recited the progress of the work until Sept. 25, 1971, and stated in part:

* * * On Sept. 25, 1971, the first storm hit the project area and by Sept. 29 the gen-

eral site conditions had become so changed that all project operations had to be stopped. The site conditions at this point had changed so drastically that the work should have been halted and the time for completion of the project waived. However, on Oct. 4, 1971, when we advised the Bureau that the severe weather had materially altered site conditions we were directed to proceed without delay, keeping a record of the changed conditions and the time delay experienced. The Bureau's advice indicated that the consideration of delays would be determined at the completion of the work. We were orally advised at this same time that the company was expected to complete the project by the contract deadline and if necessary, to increase our work force to accomplish timely completion.[23]

The letter further alleged that after the first storm appellant's supervisors were under continuous pressure by Government inspectors not only to resume operations, but to finish the work on time. Costs claimed included heating, insulation, and tenting costs due to freezing weather, equipment and labor costs incurred in towing heavy equipment around the project, which was assertedly necessary in order to continue operations, downtime of supervisors and equipment for 8 days when no work was performed between Sept. 25 and Nov. 1, 1971, labor hours and equipment time lost due to conditions at the site, labor costs incurred during an additional 8 days of concrete pouring time, excess labor overtime hours, and labor costs on 4 days when crews were brought to the site, but work had to be discontinued because of weather. It seems evident that the major portion of costs as asserted are attributable to inclement weather and would be recoverable only on the theory that appellant had a right to shut down the job.[24]

The project engineer acknowledged receipt of the claim because of weather conditions (letter, dated Jan. 3, 1972, appeal file, Exh. 11). By letter, dated Jan. 10, 1972 (appeal file, Exh. 12), appellant stated it wished to clarify the basis of its claim, asserting that the claim was based on altered site conditions brought about by weather and other conditions at the site.

Appellant was advised by the project engineer (letter, dated Mar. 16, 1972, appeal file, Exh. 17) that increased costs attributable to difficulties caused by weather were not compensable under Clause 4, Dif-

[23] This quote does, of course, apprise the Government that the contractor is relying upon oral advice from the Government to complete the contract by the Nov. 1 deadline even if it meant increasing its work forces. However, the date of such oral instructions is stated to be Oct. 4 and the Government agent who issued the instructions is not identified.

In a letter written on behalf of the contractor by appellant's counsel almost 3 months after the Dec. letter, no reference is made to telephone instructions having been received from Mr. Hart on Oct. 1. Apropos the instructions relied upon the letter states: "* * * The record shows the job inspectors did not grant any extensions; instead, I am informed, Iversen was ordered to employ added crew to complete 'on time'. * * *" (Letter of Mar. 22, 1972, appeal file, Exh. 18.)

[24] Mr. Allison identified the increased costs as follows: "The costs involved were due to the weather making it necessary to pull equipment from one area to another because of the snow and rain and mud and heating water for pouring concrete due to the cold weather, the extra men. It was necessary just to do the same job, because of extreme cold, to take extra personnel to help in the construction process." (Tr. 55.)

fering Site Conditions. In a letter, dated Mar. 22, 1972 (note 23, supra), appellant's counsel advised that the claim was not based upon unusually severe weather, but upon the denial of time extensions and orders to employ added crew to complete the work on time.

On Apr. 6, 1972, a meeting to discuss the claim was held in Denver, Colorado, with Bureau representatives, including the contracting officer. Thereafter, by letter, dated July 27, 1972 (App.'s Exh. 9), the contracting officer requested certain additional information, including whether appellant was due an extension for unusually severe weather, whether timely notice of the claim had been given, whether appellant had in fact been directed to complete the work within the originally specified time and whether increased costs, in fact, resulted from the alleged acceleration order.

A second meeting to consider the claim was held in Denver on Oct. 13, 1972. In a Findings and Decision, dated Nov. 6, 1972, the contracting officer denied the claim for lack of timely notice, for lack of evidence that the contractor added crews and equipment to accelerate performance of the work, for the reason that the contractor chose to complete the work in the fall of 1971 rather than incur the expense of demobilization and returning to the site at a later date and for the reason that costs attributable to inclement weather were not compensable under the contract. He admitted that there were times when Bureau personnel, aware of storm predictions, suggested that concrete pours be accomplished in advance of the storm. He also admitted that Bureau personnel were of the opinion that the contractor's forming crew was not adequate to keep pace with the rest of the work and often suggested the addition of more forming crewmen to make a more efficient operation. However, he found that appellant generally ignored these suggestions.

Acceleration Orders

Mr. Allison testified that appellant would have moved off of the job after the storm of Sept. 29 and 30, 1971, and resumed work the following season but for Mr. Hart's statements in the telephone conversation on October 1, 1971.[25] Mr. Richard Iversen, appellant's treasurer, testified that appellant would have moved off of the job but for the pressure to get the job done (Tr. 227–28). When asked why, he gave as reasons spiraling costs and the fact that it was becoming increasingly dangerous to operate up there. We find that Mr. Iversen's testimony relates to the period after Oct. 15.

[25] Tr. 56. He stated "* * * it was my belief that, because of the possibility this seven or eight day delay would throw us further into the year, into Winter [sic] construction, that it was very reasonable for me to expect to pull off there until we got adequate weather to work" (Tr. 84).

Mr. Allison estimated that moving off and on the job would cost approximately $3,900 for a one-way move (Tr. 56). It is also clear that there would be other expenses associated with discontinuing the work such as protecting completed or partially completed footings for the winter, backfilling, road work, etc. (Tr. 131, 132). Mr. Jack Iversen testified that at the time of the snowstorm of Sept. 29 and 30, footings for only 12½ towers had been poured, that the other expenses referred to were minor considerations and that at the time it would have been reasonable and practical to cease performance.[26]

Although we have found that the possibility of shutting the job down for the winter was discussed in the Oct. 1 telephone conversation with the project engineer, it is clear that no request, formal or informal, for such a shutdown was ever submitted to the Bureau.[27] Richard Iversen testified concerning a conversation with Mr. Chiolero regarding the Bureau's reaction if appellant pulled off of the job for the winter. He asserted that he was informed by Mr. Chiolero that if appellant did so and the weather continued nice, "* * * then we would face the consequences of having our contract terminated or somebody else gotten in there" (Tr. 224). Mr. Chiolero recalled the question as having been stated in general terms.[28] He asserted that he regarded the question as academic and not related to the actual situation facing appellant. We find this position understandable in view of the fact that Mr. Iversen placed the date of the conversation in the period Oct. 4 to Oct. 7, 1971 (Tr. 225), which was after the weather had moderated and appellant had resumed work.

When asked what factors appellant took into consideration in

[26] After testifying that "the only actual stopping point on the job that was practical and reasonable" was in early Oct. of 1971 following the heavy snowfall in late September, Mr. Jack Iversen gave the following testimony upon direct examination: "Q. * * * what do you mean by that, sir? At what point were you and how does that practically affect the course of the work? A. At that point, we had poured 12 and a half towers. These were the critical ones. Of course we knew those towers had to be protected for the winter, * * * to back-fill them within guidelines Mr. Chiolero established was not a major consideration. Then the work beyond there, especially the work on the south side of the line, had just begun. * * * At that point we could have ceased in a practical and reasonable manner. From there on, when we started back to work, then a series of jobs had to be done. And each time we did a series of jobs, then it would be about—well, it would be about ten more operations that were inevitable. Q. Once commenced in a series, you had to complete it? A. Yes, yes" (Tr. 131–32).

Mr. Jack Iversen was unable to relate any difficulties with the inspectors to the first half of Oct. (Tr. 134). The record indicates that by the time the second period of bad weather commenced on Oct. 15, 1971, the contractor was committed to finishing the work (Tr. 386–389).

[27] Mr. Chiolero admitted that the subject of a winter shutdown was discussed many times with Jack Iversen. However, he denied ever receiving a request for such a shutdown (Tr. 380, 384). Jack Iversen testified that he did not make such a request because Richard Iversen, a company owner, was on the job and the responsibility for such matters was Richard Iversen's (Tr. 154). Richard Iversen acknowledged that he had not made such a request to the project office (Tr. 230).

[28] He testified that Mr. Iversen's question was: "What happens if a contractor pulls out of a job and doesn't complete it?", and that his reply was "Well, in that case, they would probably bring in another contractor" (Tr. 407).

evaluating its position after the first storm, Richard Iversen replied, "The factors we took into consideration would be if the weather did not get bad again and it remained nice the rest of the job * * *" (Tr. 231). He admitted to not understanding what appellant's rights were under the contract in regard to shutting down the job and of having a difficult decision to make.

Mr. Allison expressed the opinion that appellant was directed to complete the job by Nov. 1, 1971 (Tr. 55, 93). He asserted that as he understood orders (from the Bureau) appellant was to complete the work within the time stipulated in the contract without change and if necessary add men and equipment to do the job (Tr. 43, 55, 65). This testimony was based on the October 1 telephone call with Mr. Hart, the project engineer's letter of Oct. 8, 1971, which Allison regarded as a denial of appellant's request for a time extension, and feedback of various conversations appellant's personnel had with Bureau inspectors. He testified that he was informed by Richard Iversen that Mr. Chiolero had said the job was going to be terminated for default, if it was not completed by Nov. 1 (Tr. 93). It will be recalled that Mr. Iversen's testimony concerning the conversation with Chiolero was to the effect that if appellant pulled off of the job and the weather remained nice, then they would face the consequences of having the contract terminated.

He (Allison) testified that appellant's foremen were told by the inspectors on numerous times to increase the number of employees to complete the job by Nov. 1. He stated,

> And there were other conversations that were relayed to me to that same effect, we needed more people to back fill [*sic*] the footings, more forming people. Generally they were dissatisfied with the number of people and they kept pressing for more to complete. (Tr. 59.)

Mr. Jack Iversen testified that after the first storm Messrs. Chiolero and Bouett [29] were very insistent that appellant speed up the work (Tr. 126). He stated they wanted graders on the road, more equipment for other things and that they wanted more men. He quoted Mr. Chiolero as saying, "I want an army of men on this mountain." While he recalled that appellant added approximately a dozen people to the job after Oct. 4, 1971, he conceded that at times he ignored suggestions of Mr. Bouett and Mr. Chiolero that additional men and equipment be employed because he did not consider it practical or economical (Tr. 128, 130). He could not recall specifically discussing the number of men and amount of equipment on the job with Bureau inspectors during the latter part of October and he objected to the use by appellant's

[29] Field Engineer and Mr. Chiolero's supervisor. Mr. Bouett did not appear as a witness at the hearing.

counsel of the term "directed" in connection with the employment of additional men and equipment, asserting that he thought its use was unfair (Tr. 139–40).

On cross-examination, Mr. Iversen acknowledged that Messrs. Bouett and Chiolero [30] had not directed him to speed up the work (Tr. 153). He placed the "suggestions" of Messrs. Bouett and Chiolero that the work be speeded up in the context of statements to the effect that the weather was normal and that they intended the work to be completed on time.[31]

Mr. Glen Hasenwinke, appellant's foreman in charge of placing and removal of steel scaffolding, testified that when work resumed after the first storm, Mr. Chiolero was forcing the issue and that he (Chiolero) said, "* * * now we had to get her done" (Tr. 207, 209). He said we just flat had to get her done. Mr. Edward Galeazzi, foreman in charge of backfilling operations, quoted Mr. Chiolero as saying appellant should get more men and equipment or they would never get done (Tr. 218). At another point he asserted that John (Chiolero) stated appellant needed more men on the backfill operation (Tr. 219). On cross-examination, he admitted that Mr. Chiolero did not personally order him to employ more men and equipment and that the orders came from the inspector under John, who asserted it came from Chiolero (Tr. 221). He conceded that he did not add more men and equipment at that date.

Richard Iversen testified concerning discussions with Mr. Chiolero upon the resumption of work after the first storm. He asserted that "* * * they [Bureau representatives] felt that we couldn't complete them [sic] with the work force we had and we would have to get more men and more equipment for different phases of it" (Tr. 224). He stated they were constantly after us to get more men, more equipment, get more work done (Tr. 225). He was present at the job site (in a Bureau pick-up which was equipped with a radiotelephone) at a time when Mr. Chiolero had a conversation with Mr. Bouett.[32] According to Mr. Iversen, "Mr. Bouett told John to get us in gear and get more men

[30] After award but before the preconstruction conference, Mr. Chiolero accompanied Mr. Allison and Mr. Jack Iversen on a tour of the site (Tr. 120). According to Mr. Chiolero the contractor personnel accompanying him on the tour stated that "* * * they had never done any footing work prior to this and would appreciate any help that might be given to them" (Tr. 377). He also testified that during contract performance his assistance was sought and that from time to time he offered suggestions (Tr. 378).

While Mr. Allison speaks of the contractor's superintendent being told to increase the personnel to get the job completed by November 1 (Tr. 59), it is clear that the contractor's superintendent himself viewed the intervention of Mr. Chiolero as involving suggestions which he accepted or rejected on the basis of whether the suggestions were considered to be practical or economical (Tr. 125, 130, 140–141, 153).

[31] Tr. 153. He stated that he was fully aware of the "weather clause" in the contract and that "Any reference or continued reference they made to the fact the weather was not unusual or severe would lead me to believe that I had to get the job done, come hell or high water * * *" (Tr. 141).

[32] Although it is not entirely clear, this conversation was on or about the date of the controversy over appellant's refusal to make a pour (Tr. 227), which was on October 22, 1971 (note 12, *supra*).

going and get that job done by the completion date" (Tr. 226).

Iversen's understanding was that Mr. Chiolero was acting under Mr. Bouett's orders throughout the job. He admitted that Bureau representatives never forced appellant to hire (additional) people, but quoted them as saying, "You are not going to complete unless you get more men, get more equipment, more cats, more laborers, more backfill guys" (Tr. 227).

Mr. Chiolero flatly denied ever telling appellant to increase the number of men and equipment on the job (Tr. 383, 384). However, he instructed inspectors working under him to assist in any way possible to speed up the operation (Tr. 373). He admitted to being told by Mr. Bouett (apparently in connection with the resumption of work after the first storm), "* * * get on it as soon as you can" and that he passed this on to appellant (Tr. 395). He also admitted to saying (apparently to Jack Iversen) something to the effect that he wanted bodies all over the mountain or an army of men all over the mountain, but asserted that this was in the context of a question as to what would make him happy (Tr. 405, 406). He confirmed receiving a call from Mr. Bouett while Richard Iversen was present wherein Mr. Bouett inquired if appellant was adding more men and equipment to speed up the work.[33]

Mr. Chiolero quoted Jack Iversen as stating he would complete the job (Tr. 386, 388). At another point he quoted Mr. Iversen as saying he would complete the job in order to avoid the expense of returning in the spring (Tr. 389). He placed the dates of these conversations in the latter part of October, between the 15th and the 25th, and admitted that they were in the context of the end of the job being so close, that appellant was committed to finishing.

Ultimate Findings and Decision

As might be expected, the Government argues that even if appellant has proved all of the elements required for constructive acceleration, the claim must, nevertheless, be denied for failure to comply with the 20-day notice provision of the Changes Clause. We do not decide this question, however, since we find no merit in the claim.[34]

[1] In *Electrical Enterprises, Inc.* (note 34, *supra*), we set forth the general requirements for grounding a successful constructive acceleration claim. Basic to such a

[33] Tr. 407. He answered affirmatively to a question of this import propounded on cross-examination. This obviously is a far different and more innocuous version of the conversation than testified to by Mr. Iversen. But for this manner of phrasing the question, the Government's unexplained failure to call Mr. Bouett, an apparently available, material witness might warrant an inference that his testimony would be adverse. See, *e.g.*, *Neely* v. *Johnson*, 215 Va. 565, 211 S.E. 2d 100 (1975). *Cf. William R. Sherwin* v. *United States*, 193 Ct. Cl. 962 (1971) at 984–85.

[34] *Electrical Enterprises, Inc.*, IBCA–971–8–72 (Mar. 19, 1974), 81 I.D. 114, 121, 74–1 BCA par. 10,528, at 49,866.

claim is, of course, a finding that the contractor has actually or by implication been ordered to complete the work in a lesser time than was properly available therefor. Since we find this issue dispositive of the appeal, we have no occasion to consider whether the other requirements for a constructive acceleration claim are present.

Appellant relies heavily upon the Oct. 1, 1971, telephone conversation between its Vice President, Ronald Allison, and Project Engineer Hart, as a directive to add the necessary men and equipment to the job in order to complete the work by Nov. 1, 1971 (Posthearing Brief, p. 34). Even if we were to accept Mr. Allison's version of this conversation (text following reference to note 18, *supra*), we would have considerable difficulty in accepting Mr. Hart's statements as an unequivocal order to add men and equipment to the job to complete the work by Nov. 1. First, the statement that the work had to be completed by November is qualified by the phrase "until that [unusually severe weather] was proven." Second, the statement "that in order to get completed by Nov. 1, it was necessary to add more men and equipment to the project site" is subject to the reasonable construction that it was merely an expression of opinion.

However, appellant asserts (Posthearing Brief, p. 34) "He [Allison] testified without conflict that Hart directed the contractor to put to work the men and equipment required to complete the job on time without qualification" and we will assume, without deciding, that Hart's statements as testified to by Mr. Allison could constitute an acceleration order. The quoted assertion is, of course, inaccurate since Hart flatly denied ever directing appellant to add men and equipment to the job in order to complete by Nov. 1. Hart's version of the conversation was that Allison inquired how the work could be speeded up and that he made a suggestion which Allison chose to follow (note 21, *supra*).

Confronted with a situation where the difference between a "directive" and a suggestion in response to a seemingly obvious question may depend on individual recollection,[35] we have examined the testimony of Messrs. Allison and Hart in the light of the correspondence exchanged at the time and in the ensuing 6 months.

If the Oct. 1 telephone conversation had the significance now attributed to it, it is at least surprising that appellant's letter of Oct. 4 (appeal file, Exh. 3), failed to refer to the conversation. We say surprising for the October 4 letter was the result of a joint effort by Mr. Allison (Vice President) who had been a party to the conversation and Mr. Weber (Corporate Secretary), who had heard the conversation and who had been briefed by Mr. Allison as to what Mr. Hart had said when the conversation concluded. Whatever

[35] The Administrative Judge who presided at the hearing is no longer a member of the Board.

the reason for this curious omission, it may not be attributed to appellant's failure to appreciate its significance, since Mr. Weber testified that the letter was sent to request a time extension and to verify the conversation.

Similarly, there is no reference to the telephone conversation in appellant's letters of Oct. 18, 1971 (Gov't. Exh. A), Oct. 29, 1971 (appeal file, Exh. 5), Nov. 30, 1971 (appeal file, Exh. 7), Dec. 29, 1971 (appeal file, Exh. 10), and Jan. 10, 1972 (appeal file, Exh. 12), or in the letter of Mar. 22, 1972, written by appellant's counsel (notes 22 and 23, *supra*).

Thus, for almost 6 months after the telephone conversation upon which appellant now relies so heavily, appellant never referred to it in any correspondence with the Government, including that relating to its request for a time extension and its claim for an equitable adjustment. We therefore find that Mr. Hart's version of the conversation is the more credible,[36] and that appellant has failed to establish that on Oct. 1, 1971, it was expressly or by implication ordered by the project engineer to add men and equipment to the job so as to complete the work by the scheduled date of Nov. 1, 1971.[37] Contrary to appellant's assertion,[38] we are not persuaded that appellant's actions at the time are consistent with those of a contractor who has been directed to complete the work by the specified completion date notwithstanding its request for a time extension.

Entirely aside from the question of what instructions may have been issued by the project engineer on Oct. 1, 1971, however, the appellant has raised issues concerning the failure of the Government to grant a time extension based upon the information in its possession on that date and more specifically its obligation to order the contractor to cease work because of the conditions then existing until the following spring or summer. At the outset we note that the Government appears to have misconceived the nature of its obligation to investigate the contractor's claim for time extension

[36] *See Standard Electronics Corporation*, ASBCA Nos. 14753, 16299 (June 15, 1973), 73-2 BCA par. 10,137 at 14,668-669 ("* * * On a matter of this importance it is difficult to understand why appellant did not verify such an understanding in writing if it in fact existed * * *."). This decision has been affirmed, *Frank A. Pelliccia, Statutory Receiver For Standard Electronics Corp.*, Ct. Cl. No. 36-74 (November 19, 1975).

[37] Appellant cites *Tombigbee Constructors, et al. v. United States*, 190 Ct. Cl. 615 (1970), which stands for the proposition that as long as the initiative comes from the Government, a request to expedite the work may be fully equivalent to an acceleration order. We are in full agreement with the holding in *Tombigbee*, but find it inapposite since, even if in other contexts a suggestion might be the equivalent of an acceleration order, we find the record in this instance insufficient to support a finding that the initiative to accelerate came from the Government.

[38] Posthearing Brief, p. 34 "There is not one scintilla of evidence to discount contractor's contention and testimony that it acted in this fashion to accord with what it considered the directions of the authorized contracting officer given in the telephone conversation."

based upon usually severe weather.[39] From the contractor's standpoint the difficulty is that it appears to have acquiesced[40] in the Government's handling of the claim for a time extension even to the extent of not apprising the Government of the results of Mr. Allison's investigation of the matter in the Oct. 1, 1971, telephone conversation or in the Oct. 4, 1971, letter requesting the time extension.[41] As to the claimed obligation the Government had to order the contractor to shut down for the winter because of the record snows in late Sept., the absence of any contract provision requiring such action[42] and the failure of the contractor to ever make such a request militate strongly against acceptance of the appellant's position (see note 27, *supra* and accompanying text). Indeed the failure of Mr. Allison to furnish the Government with relevant information in his possession at the time of the Oct. 1 telephone conversation or at the time of the Oct. 4, 1971, letter raises a serious question as to whether the contractor had definitely decided that shutting the job down for the winter was the course of action it desired to pursue. In this connection we note that at the time of the Oct. 1, 1971, telephone conversation it had ceased to snow, the weather was clear and that as it turned out the good weather continued for another two weeks (note 8 and accompanying text). In these circumstances the conclusion appears to be warranted that the contractor's decision to resume work on Oct. 4, 1971, was motivated by the improving weather conditions rather than the actions of the Bureau's representatives.

Another ground for the acceleration claim asserted appears to be the actions taken or allegedly taken by the Government's principal inspector, Mr. Chiolero. With respect to such actions, the evidence clearly shows (i) that prior to the instant contract the contractor had never done any footing work and had stated that it would appreciate any help the Bureau would give, (ii) that Mr. Chiolero did offer suggestions from time to time and instructed the inspectors under him to assist the contractor in any way they could, (iii) that the suggestions made were accepted or rejected by the contractor's superintendent on the basis of the exercise of his own business judgment, and (iv) the suggestions to which the contractor objects appear to have occurred on or after October 15,

[39] *Paul A. Teegarden*, IBCA-382 (Sept. 27, 1963), 70 I.D. 436, 437, 1963 BCA par. 3876 at 19,260.

[40] *Canadian Commercial Corporation* v. *United States*, 202 Ct. Cl. 65, 79 (1973); *Microcord Corporation* v. *United States*, 176 Ct. Cl. 46 (1966) at 54 ("* * * Plaintiff does not seem to have acted as if it were particularly troubled by the condition of the drawings during performance and did not make a formal complaint along the lines now urged until the work had actually been completed. Its conduct, in fact, bespeaks an understanding and acceptance of the Government's position. * * *").

[41] See text in paragraph immediately preceding reference to note 19, *supra*.

[42] *Cf. Pathman Construction*, ASBCA No. 14285 (May 25, 1971), 71-1 BCA par. 8905 at 41,386 ("* * * As stated above, the contract neither required nor prohibited the performance of outside work under winter conditions. The provisions of the contract and masonry specifications * * * merely provided the conditions under which such work would be performed if appellant elected to do so during cold weather. * * *").

1971, or during the period when the contractor felt committed to finish the work by Nov. 1 if at all possible (notes 26 and 30, *supra*). In view of the nature of the evidence in this case, we do not reach the question of what authority Mr. Chiolero or the other inspectors would have had to bind the Government by directing the contractor to add men and equipment to the job in order to complete the contract work by Nov. 1, 1971.

Conclusion

1. The claim for placing concrete is considered to have been abandoned (note 1, *supra*) and is therefore dismissed with prejudice.

2. The acceleration claim is denied.

SPENCER T. NISSEN,
Administrative Judge.

I CONCUR:

WILLIAM F. MCGRAW,
Chief Administrative Judge.

I concur in the concrete claim and dissent on the acceleration claim for the reasons stated in the attached opinion:

KARL S. VASILOFF,
Administrative Judge.

DISSENTING OPINION BY ADMINISTRATIVE JUDGE VASILOFF

I do not agree with the majority decision since I believe the appellant was constructively accelerated due to the totality of the actions and inactions of the Government.

After the original bids were rejected the Government knew the period remaining in 1971 was limited to complete the required construction. The original bidders were notified on July 30, 1971, of the rejection. New bids were opened on Aug. 6, 1971. On July 29, 1971, the Government's acting regional director informed the contracting officer by teletype in pertinent part as follows:

REJECTION WITH IMMEDIATE READVERTISEMENT FOR FOUNDATIONS CONSIDERED BUT TIME FOR COMPLETION INSUFFICIENT. REJECTION WITH READVERTISEMENT NEXT YEAR CONSIDERED BUT USE OF EXISTING SECTION OF LINE THROUGH COMMING [*sic*] WINTER WITHOUT FOUNDATIONS FOR NEW TOWERS TOO RISKY. OTHER OPTIONS AVAILABLE BUT ECONOMIC ADVANTAGES QUESTIONABLE. (Appellant's Ex. 15.)

Failure of the concrete footings to be poured by the November 1 date would delay the erection of the towers. Should the Government lines collapse again there could be a loss of revenue of $5,000 a day (Appellant Ex. 4, 15, 16, 17, 18; Tr. 235, 305–313).

The Government had three inspectors at the construction site. Two of the inspectors were at the site from the beginning of work until the completion and the third inspector came on the site at the commencement of the back fill operations and remained until the com-

pletion of the work (Tr. 371–373, 389). The chief inspector kept his immediate supervisor, Mr. Bouett, fully informed of the conditions of the work site and the status of the construction at all times (Tr. 374, 394, 395). Mr. Bouett was also at the work site three or four times each week to observe the status of the construction and the weather conditions (Tr. 404). Each inspector made out daily work reports which included the quantity of work performed, condition of the work and a description of the weather. These reports were then forwarded to Mr. Hart, the project construction engineer for the Government, whose office was located at Willows, California (Tr. 373, 374). Mr. Hart did not perform any inspections at the work site (Tr. 259, 260). Mr. Bouett, field engineer for the Government, reported directly to Mr. Hart. The contracting officer, whose office was located in Denver, Colorado, delegated Mr. Hart to be his atuhorized representative (Answer par. II; Government Ex. C; Appellant Ex. 1; Tr. 257–260). Mr. Hart kept fully informed of the status and the conditions at the construction site through the receipt of the daily work reports and verbal discussions with Mr. Bouett and the chief inspector (Tr. 260, 297–301).

Much testimony was given at the hearing by Mr. Allison and Mr. Hart on what was said during the telephone conversation on Oct. 1, 1971, but unfortunately each party recollects his conversation differently. Faced with this situation I must be guided by the actions which followed the telephone conversation. Both parties agreed, however, that a request for a time extension due to unusually severe weather was discussed and Mr. Hart suggested this request be put in writing (Tr. 283). This was done by the appellant through its letter of Oct. 4.

In regard to adding more men and equipment, Mr. Hart's testimony was that this was in response to a question posed by Mr. Allison as to how the work could be completed by Nov. 1. I cannot accept this explanation by Mr. Hart. Appellant was not behind schedule when the storm struck in Sept. Appellant was an experienced contractor. To believe that appellant would ask such a question, I would have to conclude that appellant was either naive or incompetent and the record does not evidence that appellant was either. When testimony is conflicting I must decide which party to believe. *Hoel-Steffen Construction Co.* v. *United States*, 197 Ct. Cl. 561 (1972).

The majority relies upon the appellant's omission to refer to the October 1 telephone conversation in its letters of: Oct. 4, 18, 29; Nov. 30; Dec. 29, 1971; Jan. 10, and Mar. 22, 1972. Mr. Hart testified he knew that appellant from the time of the

Standard Form 23–A defined the contracting officer as:

* * * the person executing this contract on behalf of the Government and includes a duly appointed successor or *authorized representative*. (Italics supplied.)

Oct. 1 telephone conversation was referring to a request for additional costs for working through a period of severe and unusual weather (Tr. 315–317). Indeed, Mr. Hart testified he considered the appellant's letter of October 4 as a request for a time extension for the entire job and that from Oct. 1 he knew appellant wanted to process a request for a time extension (Tr. 296, 358).

On the same day of the Oct. 1 telephone conversation Mr. Hart discussed with the regional engineer what steps the Government would take if the work was stopped for the winter due to the weather conditions, but never communicated this information to the appellant (Joint Ex. AA; Tr. 273–275).

Mr. Hart testified appellant had the privilege to move off the mountain on its own volition and that the Government could not stop the appellant from shutting down the job (Tr. 287–290, 298, 301, 302). I could find no provision in the contract, nor has the Government pointed out any, whereby appellant could decide for itself to shut down the job and return the following year to complete the work. The contract does contain a suspension of work clause as well as a termination for convenience of the Government clause, but both clauses come into operation at the option of the Government, not the appellant. If appellant failed to make proper progress the Government could terminate the contract for default and assess liquidated damages. Appellant had a duty to make proper progress to complete the work by the contract completion date of Nov. 1.

During the course of the construction work, Mr. Hart never made a recommendation to the contracting officer on the request for a time extension (Tr. 295–296). Mr. Hart's position was that the Government did not need to make a determination on the request for a time extension until it appeared the work would not be completed within the contract completion date and the Government was supplied with the weather data. Since the work was substantially completed by the Nov. 1 date, the Government's position is that the occasion never arose to make a decision on the request for a time extension. Under this philosophy of "heads I win, tails you lose," the appellant would be at the mercy of the Government under the facts of this case. The Government knew before the invitations for bids were sent out that the completion time was "insufficient" and that use of the existing section of the transmission line without foundations for new towers was "too risky" to go through another winter. The contract contained clauses for termination for default and assessment for liquidated damages. If the work was not completed within the scheduled time the Government knew it could lose $5,000 per day in revenue. Upon a request for an extension of time due

to unusually severe weather, the language in Clause 5 of the General Provisions (Standard Form 23–A) is clear that the Government:

> * * * shall ascertain the facts and the extent of the delay and extend the time for completing the work * * *.

This Board has held that the duty is upon the contracting officer to obtain the weather data necessary to make a determination, not on the contractor. *Paul A. Teegarden*, IBCA–382 (Sept. 27, 1963), 70 I.D. 436, 63 BCA par. 3876. The majority states:

> * * * the Government appears to have misconceived the nature of its obligation to investigate the contractor's claim for time extension based upon unusually severe weather.

When the burden of obtaining the weather data is upon the Government it cannot be shifted to the appellant. Such information is readily available from the Government's own agency. When the Government fails to act within a reasonable period of time it effectively compels a contractor to continue work on the contract. I would hold a failure to act upon a request for an extension under the facts in this appeal constitutes a denial of the request. The Court of Claims in *Continental Consolidated Corporation* v. *United States*, 17 CCF par. 81, 137, trial judge opinion adopted Dec. 1, 1972, 200 Ct. Cl. 737 (1972) explains the necessity for a reply within a reasonable period of time.

> To otherwise hold would allow the Government to accomplish by inaction what it refrained from doing directly. It could effectively accelerate the contractor by inordinately delaying action on time extension requests, meanwhile directing the contractor to complete in accordance with the unadjusted schedule; and finally granting time extensions after completion of the contract to conform to the completion dates actually achieved. To serve any useful purpose with regard to an acceleration claim, the completion date must be extended in response to time extension claims when made, so that the contractor can adjust its operations accordingly. This is what the "Changes" clause (and other clauses drafted by defendant to deal with time extension) actually contemplate. A contractor under directive to finish by a date earlier than the one to which the contract is ultimately extended, has been effectively ordered to accelerate. The board of contract appeals have consistently so held.

In this situation the Government had a duty to respond. It did not do so.

The majority has found that appellant encountered unusually severe weather in September and determined 6 calendar days would be an appropriate extension. For Oct. the majority also found unusually severe weather was encountered and found appellant would be entitled to an extension of 4 calendar days. The majority found a total of 10 calendar days which would be granted to appellant as an extension had appellant timely requested it. I believe appellant did request it, the Government had knowledge of the request and the Government failed to respond.

For the appellant, its construction superintendent, foreman of the back fill crew, and treasurer, all

testified that they were told by the chief inspector and the field engineer, Mr. Bouett, for the Government to add more men and equipment after Oct. 4, so the work would be completed by November 1 (Tr. 126, 156, 218, 223–226). The chief inspector admitted that the appellant's treasurer's testimony was correct when he testified he heard the Government's field engineer, Mr. Bouett, ask the chief inspector if appellant had added more men and equipment to speed up the work so it would be completed by Nov. 1 (Tr. 226, 407).

In regard to additional equipment and manpower, Mr. Allison testified that as a result of his telephone conversation on Oct. 1, he instructed his project engineer to increase the work crew and equipment. Ten additional men increased the crew and more equipment was added (Tr. 45, 46). The testimony of Mr. Allison was buttressed by the testimony of appellant's construction engineer, foreman for steel scaffolding and treasurer, all testified additional men and equipment were added in Oct. (Tr. 128, 205, 227, 228). The chief inspector for the Government admitted more men and equipment were added in Oct. (Tr. 405).

The Government's concern about the Nov. 1 completion date was intensified by the course of conduct of the inspectors on the job site who became more demanding that work continue through the adverse weather. The field engineer for the Government inquiring of the chief inspector whether appellant had hired more men and added more equipment to speed up the work is not the action of a party not concerned with meeting the Nov. 1 completion date.

Once this determination was made by the Government it saw no need to respond to any request for an extension of time. Mr. Hart was the Government's authorized representative for the contracting officer and appellant properly had a right to deal with Mr. Hart.

I believe the course of conduct of the Government after the request for an extension of time was made constitutes a constructive acceleration. The changes clause of this contract specifically provides an acceleration comes within the scope of the clause. Coupled with the Government's conduct, the appellant adding more men and equipment would be the actions of a contractor acting to complete the work on schedule knowing that the Government has not responded to a request for an extension.

Since I believe the appellant was constructively accelerated I turn to the Government's defense that the claim is barred by failure to give the 20-day notice pursuant to clause 3 (Changes) of Standard Form 23–A. It must be admitted appellant has inexpertly categorized its claim for acceleration in its correspondence with the Government. It is equally clear, in this instance, the Government had full knowledge of the basis of appellant's claim from

Oct 1, 1971. With a series of letters commencing Oct. 4, appellant wrote the Government on Oct. 29, Nov. 30, Dec. 29, 1971, and Mar. 22, 1972. All of these letters were addressed to Mr. Hart, the authorized representative of the contracting officer. Only on Mar. 22, 1972, claims the Government, did appellant finally convey the nature of its claim, although not using the appropriate phrase—constructive acceleration. I am concerned with substance, as long as both the contractor and the Government know and understand what the dispute is about I will not engage in Alice in Wonderland semantics. In *Orndorff Construction Co., Inc.*, IBCA–372 (Oct. 25, 1967), 74 I.D. 305, 67–2, BCA par. 6,665, this Board said:

> The fact that an appellant has characterized its claim as for breach of contract will not defeat our jurisdiction, however, if there is a contract provision under which relief of the type sought may, upon a proper showing, be provided.

The Government knew a request for a time extension was pending and it was bound by the holding in *Cox and Haddox*, IBCA–155 (Mar. 26, 1959), 66 I.D. 97, 59–1 BCA par. 2,111, that a contractor could not be expected to absorb any costs due to an acceleration. Appellant's letter of Oct. 4 was in response to Mr. Hart's request during the telephone conversation to put the request for an extension of time in writing. The Oct. 29 letter, which was an update of the Oct. 4 letter, informed Mr. Hart that it was working through the weather encountered at the construction site and that it was continuing to document the necessary information to determine an equitable adjustment to the contract. Accordingly, I would hold that the Oct. 4 letter updated with the Oct. 29 letter provides the 20-day notice required by the contract.

MISSING PAGES ARE INDEX PAGES
WHICH HAVE BEEN PHOTOGRAPHED
AT THE BEGINNING OF THE VOLUME(S)